TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 626.

WASHINGTON RAILWAY & ELECTRIC COMPANY,
PLAINTIFF IN ERROR,

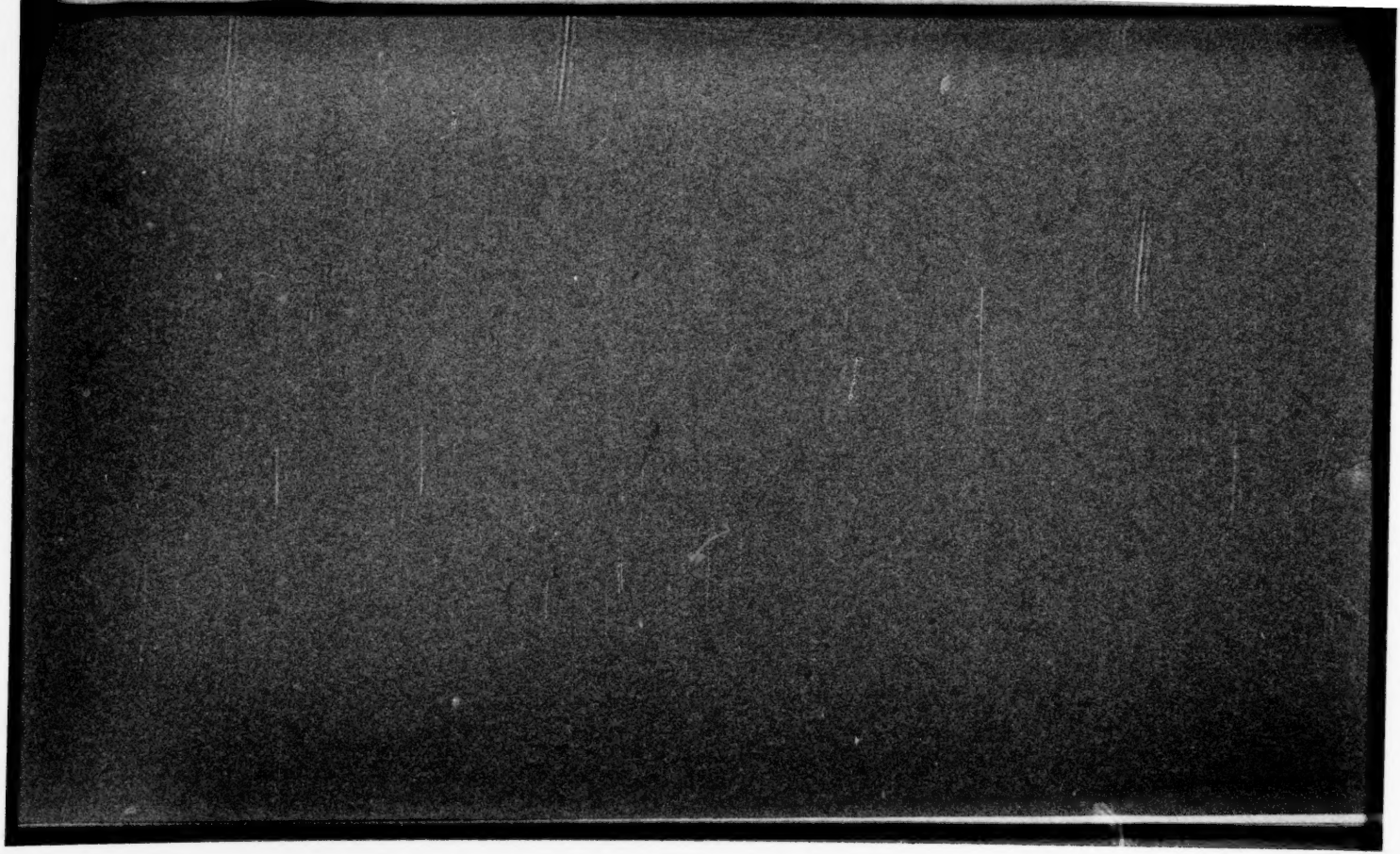
vs.

ANN CATHERINE SCALA, ADMINISTRATRIX OF THE ESTATE OF ALVIN JOSEPH SCALA, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 20, 1916.

(25,565)



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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 2, 1917.

a TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia, April Term, 1916.

No. 2935.

WASHINGTON RAILWAY & ELECTRIC COMPANY, Appellant,

vs.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased.

Appeal from the Supreme Court of the District of Columbia.

Filed March 10, 1916. Printed March 31, 1916.

1 Court of Appeals of the District of Columbia.

No. 2935.

WASHINGTON RAILWAY & ELECTRIC COMPANY, Appellant,

vs.

ANN CATHERINE SCALA, Adm'x, &c.

Supreme Court of the District of Columbia.

At Law. No. 56581.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased, Plaintiff,

vs.

WASHINGTON RAILWAY & ELECTRIC COMPANY, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss.

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Declaration.

Filed January 27, 1914.

In the Supreme Court of the District of Columbia.

At Law. No. 56581.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased, Plaintiff,

vs.

WASHINGTON RAILWAY & ELECTRIC COMPANY, Defendant.

1. The plaintiff, Ann Catherine Scala, the duly appointed and qualified Administratrix of the Estate of Alvin Joseph Scala, deceased, under and by virtue of the decree and authority of the Supreme Court of the District of Columbia sues the defendant,
2 the Washington Railway & Electric Company, a corporation duly incorporated, doing business in the District of Columbia and in the State of Maryland, for that the defendant on to-wit the eighth day of July, 1913, was and prior thereto and since has been and still is a common carrier of passengers for hire, owning and operating certain lines of railways in the said District and State propelled by electricity running and conducted on overhead wires above the cars, which overhead wires are supported by cross-wires attached to upright posts or poles planted or placed in the ground on the outside of each track, and said railways being run and operated among other streets lines and places on and over Prospect Avenue, westward from Thirty-sixth Street, Northwest, and thence westwardly over a right of way or suburban line or territory and country to Glen Echo and Cabin Johns Bridge, in the County of Montgomery, in the State of Maryland; and for that the said deceased, plaintiff's intestate, on the day and date aforesaid and prior thereto had been and was employed by the defendant as a conductor on one of the summer cars of the defendant operated over the car line aforesaid and in the performance of his duties as such conductor was required to step, walk and move along the running board or stepping board along the outer side of the summer cars and to catch and hold on to the stanchions or holders affixed to the uprights at the end of each seat on said cars for the purpose, among other duties, of collecting the fares from the passengers in and upon said cars; and for that it then and there became and was the duty of the defendants so to plant or place these upright posts or poles along the outer tracks of said car line for the purpose of holding or supporting the trolley wires and overhead wires, that the said posts or poles would not be too near and close to said cars or the stepping board thereof or to persons on the stepping board thereof catching or holding on to said stanchions or holders while said cars were in motion along said track thereby endangering the lives or entailing injur

to the persons of those lawfully on and upon the stepping board of said cars, but to plant or place said upright posts or poles at a sufficient distance or space from said cars or the stepping boards thereof, so that persons whose duty would require them to be or persons who were lawfully in and upon the stepping boards of said cars and catching and holding on to said stanchions or holders could with safety and security stand upon and ride on said stepping boards, while said summer cars might be in motion over the tracks and lines aforesaid, but the defendant wholly unmindful of its duty in the premises as aforesaid did negligently, carelessly and in a dangerous manner plant or place said upright posts or poles along the outer tracks of said line too near to the cars and to the running board of the summer cars running over said tracks and line aforesaid, leaving only a distance of to-wit seventeen inches between said posts or poles and the stanchions or holders affixed to the uprights at the end of each seat on said summer cars, and for that the deceased on the day and date specified, while employed as aforesaid and operating a summer car of the defendant, numbered to-wit 1625,
3 running westwardly over said track and line in and about the vicinity of and at or what is known as McCoy's Station in the District of Columbia, and while lawfully in and upon the stepping board of said car holding on — the stanchions or holders aforesaid, while in the performance of his duties as aforesaid and while in the exercise of all due care was hit or struck suddenly with force and violence on the right side of his head by one of the said posts or poles planted by the defendant too near to the running board or stanchions or holders on the summer cars, as aforesaid, to-wit the distance of only seventeen inches from said stanchions or holders on said summer cars, and was thereby knocked from said car violently and suddenly to the ground and his back bone or spine at or near the base thereof was thereby crushed and broken and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages, in direct consequence whereof the said deceased died, on to-wit the eighth day of July, 1913, within one hour after being hit and struck as aforesaid; and for that the deceased at the time of his death was unmarried and was to-wit, eighteen years of age, and left surviving him this plaintiff, who is his mother and Francis William Scala his father as his only next of kin, with whom he resided and to whose support he contributed and who by reason of the wrongful act, negligence and carelessness of the defendant as aforesaid resulting in the death of said deceased has suffered and will in the future suffer great loss and damage and will be deprived of the support, maintenance, benefits and advantages which otherwise would have been given, rendered and supplied by the deceased had he lived.

Wherefore the plaintiff says that by reason of the premises and in accordance with the statutes in such cases made and provided, the defendant is liable for an action of damages and a right of action has accrued to the plaintiff as the personal representative of said deceased on behalf of and for the benefit of the next of kin of

deceased and accordingly the plaintiff brings this suit and claims the sum of Ten thousand ($10,000) dollars.

2. The plaintiff, Ann Catherine Scala, the duly appointed and qualified Administratrix of the Estate of Alvin Joseph Scala, deceased, under and by virtue of the decree and authority of the Supreme Court of the District of Columbia sues the defendant, the Washington Railway & Electric Company, a corporation duly incorporated, doing business in the District of Columbia and in the State of Maryland, for that the defendant on to-wit the eighth day of July, 1913, was and prior thereto and since has been and still is a common carrier of passengers for hire, owning and operating certain lines of railways in the said District and State propelled by electricity running and conducted on overhead wires above the cars, which overhead wires are supported by crosswires attached to upright posts or poles planted or placed in the ground on the outside of each track, and said railways being run and operated among other streets lines and places on and over Prospect Avenue, westward from Thirty-sixth Street, Northwest, and thence westwardly over a right of way or suburban line or territory and count-y to Glen Echo and Cabin Johns Bridge, in the County of Mont-
4 gomery, in the State of Maryland; and for that the said deceased, plaintiff's intestate, on the day and date aforesaid and prior thereto had been and was employed by the defendant as a conductor on one of the summer cars of the defendant, operated over the car line aforesaid and in the performance of his duties as such conductor was required to step, walk and move along the running board or stepping board along the outer side of the summer cars, and to catch and hold on to the stanchions or holders affixed to the uprights at the end of each seat on said cars for the purpose, among other duties, of collecting the fares from the passengers in and upon said cars; and for that the defendant did negligently, carelessly and in a dangerous manner plant or place said upright posts or poles along the outer tracks of said line too near to the cars and to the running board of the summer cars running over said tracks and line aforesaid, leaving only a distance of to-wit, seventeen inches between said posts or poles and the stanchions or holders affixed to the uprights at the end of each seat on said summer cars, and less than to-wit, seventeen inches between said posts or poles and the outer edge of said running boards; and for that the deceased on the day and date specified, while employed as aforesaid and operating a summer car of the defendant, numbered to-wit 1625, running westwardly over said track and line in and about the vicinity of and at or what is known as, to-wit, McCoy's Station, in the District of Columbia, and while lawfully in and upon the stepping board of said car holding on to the stanchions or holders aforesaid, while in the performance of his duties as aforesaid and while in the exercise of all due care was hit or struck by one of the said posts or poles planted by the defendant too near to the running board or stanchions or holders on the summer cars, as aforesaid, to-wit the distance of only seventeen inches from said stanchions or holders on said summer cars, and to-wit the distance

of less than seventeen inches from the outer edge of said running boards, and was thereby knocked from said car violently and suddenly to the ground and his backbone or spine at or near the base thereof was thereby crushed and broken and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages, in direct consequence whereof the said deceased died, on to-wit the eighth day of July, 1913, within one hour after being hit and struck as aforesaid; and for that the deceased at the time of his death was unmarried and was to-wit, eighteen years of age, and left surviving him this plaintiff, who is his mother and Francis William Scala his father as his only next of kin, with whom he resided and to whose support he contributed and who by reason of the wrongful act, negligence and carelessness of the defendant as aforesaid resulting in the death of said deceased has suffered and will in the future suffer great loss and damage and will be deprived of the support, maintenance, benefits and advantages which otherwise would have been given, rendered and supplied by the deceased had he lived.

Wherefore the plaintiff says that by reason of the premises
5 and in accordance with the statutes in such cases made and provided, the defendant is liable for an action of damages and a right of action has accrued to the plaintiff as the personal representative of said deceased on behalf of and for the benefit of the next of kin of deceased and accordingly the plaintiff brings this suit and claims the sum of Ten Thousand ($10,000) dollars.

3. The plaintiff, Ann Catherine Scala, the duly appointed and qualified Administratrix of the Estate of Alvin Joseph Scala, deceased, under and by virtue of the decree and authority of the Supreme Court of the District of Columbia, sues the defendant, the Washington Railway & Electric Company, a corporation duly incorporated, doing business in the District of Columbia and in the State of Maryland, for that the defendant on to-wit the eighth day of July, 1913, was and prior thereto and since has been and still is a common carrier, engaged in trade and commerce in said District and State, owning and operating certain lines of railways in the said District and State propelled by electricity running and conducted on overhead wires above the cars, which overhead wires are supported by cross-wires attached to upright posts or poles planted or placed in the ground on the outside of each track, and said railways being run and operated among other streets lines and places on and over Prospect Avenue, westward from Thirty-sixth Street, Northwest, and thence westwardly over a right of way or suburban line or territory and country to Glen Echo and Cabin Johns Bridge, in the County of Montgomery, in the State of Maryland; and for that the said deceased, plaintiff's intestate on the day and date aforesaid and prior thereto had been and was employed by the defendant as conductor on one of the summer cars of the defendant operated over the car line aforesaid and in the performance of his duties as such conductor was required to step, walk and move along the running board or stepping board along the outer side of the summer cars and to catch and hold on to the stanchions or holders affixed to the uprights at the end of each seat

on said cars for the purpose, among other duties, of collecting the fares from the passengers in and upon said cars; and for that it then and there became and was the duty of the defendant, its officers, agents and employees, so to plant or place these upright posts or poles along the outer tracks of said car line for the purpose of holding or supporting the trolley wires and overhead wires, that the said posts or poles would not be too near and close to said cars or the stepping board thereof, or to persons or employees on the stepping board thereof catching or holding on to said stanchions or holders while said cars were in motion along said track, thereby endangering the lives or entailing injury to the person of those lawfully on and upon the stepping board of said cars, but to plant or place said upright posts or poles at a sufficient distance or space from said cars or the stepping boards thereof, so that persons or employees, whose duty would require them to be, or persons or employees, who were lawfully in and upon the stepping boards of said cars and catching and holding on to said stanchions or holders could with safety and security stand upon and ride on said
6 stepping boards, while said summer cars might be in motion over the tracks and lines aforesaid, but the defendant, its officers, agents and employees, wholly unmindful of its duty in the premises as aforesaid, did negligently, carelessly and in a dangerous manner plant or place said upright posts or poles along the outer tracks of said line too near to the cars and to the running board of the summer cars running over said tracks and line aforesaid, leaving only a distance of to-wit seventeen inches between said posts or poles and the stanchions or holders affixed to the uprights at the end of each seat on said summer cars, and for that the deceased on the day and date specified, while employed as aforesaid and operating a summer car of the defendant, numbered to-wit 1625, running westwardly over said track and line in and about the vicinity of and at or what is known as, to-wit, McCoy's Station, in the District of Columbia, and while lawfully in and upon the stepping board of said car, holding on the stanchions or holders aforesaid, and while in the performance of his duties as aforesaid, was hit or struck, suddenly with force and violence, on the right side of his head by one of the said posts or poles planted by the defendant, its officers, agents and employees, too near to the running board or stanchions or holders on the summer cars, as aforesaid, to-wit the distance of only seventeen inches, from said stanchions or holders on said summer cars, and was thereby knocked from said car violently and suddenly to the ground and his backbone or spine at or near the base thereof was thereby crushed and broken and driven into his abdominal cavity, thereby causing immediate and profuse hemorrhages, in direct consequence whereof the said deceased died, on to-wit the eighth day of July, 1913, within one hour after being hit and struck as aforesaid; and for that the deceased at the time of his death was unmarried and was to-wit, eighteen years of age, and left surviving him this plaintiff, who is his mother and Francis William Scala, who is his father, with whom he resided and to whose support he contributed and who by

reason of the wrongful act, negligence and carelessness of the defendant as aforesaid, resulting in the death of said deceased have suffered and will in the future suffer great loss and damage and will be deprived of the support, maintenance, benefits and advantages, which otherwise would have been given, rendered and supplied by the deceased had he lived.

Wherefore the plaintiff says that by reason of the premises and in accordance with the statutes in such made and provided, the defendant is liable for an action of damages and a right of action has accrued to the plaintiff as the personal representative of said deceased on behalf of and for the benefit of the said parents of deceased and accordingly the plaintiff brings this suit and claims the sum of Twenty thousand ($20,000) dollars.

4. The plaintiff, Ann Catherine Scala, the duly appointed and qualified Administratrix of the Estate of Alvin Joseph Scala, deceased, under and by virtue of the decree and authority of the Supreme Court of the District of Columbia sues the defend-
7 ant, the Washington Railway & Electric Company, a corporation duly incorporated, doing business in the District of Columbia and in the State of Maryland, for that the defendant on to-wit, the eighth day of July, 1913, was and prior thereto and since has been and still is a common carrier engaged in trade and commerce in said District and State, owning and operating certain lines of railways in the said District and State propelled by electricity running and conducted on overhead wires above the cars, which overhead wires are supported by cross-wires attached to upright posts or poles planted or placed in the ground on the outside of each track, and said railways being run and operated among other streets, lines and places on and over Prospect Avenue, westward from Thirty-sixth Street, Northwest, and thence westwardly over a right of way or suburban line or territory and county to Glen Echo and Cabin Johns Bridge, in the County of Montgomery, in the State of Maryland; and for that the said deceased, plaintiff's intestate, on the day and date aforesaid and prior thereto had been and was employed by the defendant as a conductor on one of the summer cars of the defendant operated over the car line aforesaid, and in the performance of his duties as such conductor was required to step, walk and move along the running board or stepping board along the outer side of the summer cars and to catch and hold on to the stanchions or holders affixed to the uprights at the end of each seat on said cars for the purpose, among other duties, of collecting the fares from the passengers in and upon said cars; and for that the defendant, its officers, agents and employees did negligently, carelessly and in a dangerous manner plant or place said upright posts or poles along the outer tracks of said line too near to the cars and to the running board of the summer cars running over said tracks and line aforesaid, leaving only a distance of to-wit, seventeen inches between said posts or poles and the stanchions or holders affixed to the uprights at the end of each seat on said summer cars, and less than to-wit, seventeen inches between said posts or poles and the outer edge of said running

boards; and for that the deceased on the day and date specified, while employed as aforesaid and operating a summer car of the defendant, numbered to-wit 1625, running westwardly over said track and line in and about the vicinity of and at or what is known as, to-wit McCoy's Station, in the District of Columbia, and while lawfully in and upon the stepping board of said car holding on to the stanchions or holders aforesaid, while in the performance of his duties as aforesaid, and while in the exercise of all due care was hit or struck by one of the said posts or poles planted by the defendant, its officers, agents and employees too near to the running board or stanchions or holders on the summer cars, as aforesaid, to-wit the distance of only seventeen inches from said stanchions or holders on said summer cars, and to-wit the distance of less than seventeen inches from the outer edge of said running boards, and was thereby knocked from said car violently and suddenly to the ground and his backbone or spine at or near the base thereof, was thereby crushed and broken, and driven into his abdominal
8 cavity, thereby causing immediate and profuse hemorrhages,
"(1) *and causing him to suffer intense pain and injuries*"
in direct consequence whereof the said deceased died, on to-wit the eighth day of July, 1913, within one hour after being hit and struck as aforesaid; and for that the deceased at the time of his death was unmarried and was to-wit, eighteen years of age, and left surviving him this plaintiff, who is his mother and Francis William Scala, who is his father, with whom he resided and to whose support he contributed and who by reasons of the wrongful act, negligence and carelessness of the defendant as aforesaid resulting in the "(2) *conscious pain & suffering and in the*" death of said deceased have suffered and will in the future suffer great loss and damage and will be deprived of the support, maintenance, benefits and advantages, which otherwise would have been given, rendered and supplied by the deceased had he lived.

Wherefore the plaintiff says that by reason of the premises and in accordance with the statutes in such cases made and provided, the defendant is liable for an action of damages and a right of action has accrued to the plaintiff as the personal representative of said deceased on behalf of and for the benefit of the said parents of deceased and accordingly the plaintiff brings this suit and claims the sum of Twenty Thousand ($20,000) dollars.

DANIEL W. O'DONOGHUE,
Attorney for Plaintiff.

"(1). Amendment allowed Oct. 20, 1915."
"(2.) Amendment allowed Oct. 29, 1915."

Plea.

Filed March 2, 1914.

* * * * * * *

Now comes the defendant in the above entitled cause, and for plea to the declaration filed herein, and each count thereof, says that it is not guilty as in said counts of said declaration alleged.

GEO. P. HOOVER,
Attorney for Defendant.

Joinder of Issue.

Filed April 6, 1914.

* * * * * * *

Now comes the plaintiff in the above entitled cause and joins issue on the plea of the defendant filed herein.

DANIEL W. O'DONOGHUE,
Attorney for Plaintiff.

9 Supreme Court of the District of Columbia.

Wednesday, October 20, 1915.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * * * *

Upon motion of plaintiff by her Attorney of record, leave is hereby granted to amend the 4th Count of declaration by inserting in 15th line on last page after word "hemorrhages" the words "and causing him to suffer intense pain and injuries."

Memoranda.

October 27, 1915.—"Plaintiff discontinues 1st and 2nd counts of declaration."

October 29, 1915.—"Leave is hereby granted to amend the 4th count of declaration on last page by inserting the words 'conscious pain and suffering and in the', which is accordingly done."

Verdict for Plaintiff for $7500.00.

Memoranda.

November 13, 1915.—Time to submit motion for new trial extended to and including November 27, 1915.

November 27, 1915.—Time to submit motion for new trial further extended to and including December 4, 1915.

December 4, 1915.—Time to submit motion for new trial further extended to and including December 11, 1915.

Motion for New Trial.

Filed November 2, 1915.

* * * * * * *

Now comes the defendant by its Attorney, and moves the Court to set aside the verdict of the jury rendered in this case on the 29th day of October, 1915, and to grant it a new trial for the following reasons:

1. The verdict was and is contrary to the evidence.
2. The verdict was and is contrary to the weight of the evidence.
3. The verdict was contrary to the Court's instruction as to the law governing the defendant's duty to the plaintiff's decedent.
4. The evidence did not warrant the application of the Federal Employers' Liability Law.
5. The court erred in granting the plaintiff leave to amend his declaration after both sides had completed the submission of their evidence to the court, so as to permit in this action a recovery by the plaintiff for conscious pain and suffering.
6. The court erred in refusing to grant the defendant a continuance of the case after permitting said amendment.
7. The court erred in granting the plaintiff's prayer No. 3-A.
8. The court erred in granting the plaintiff's prayer No. 4.
9. The court erred in granting the plaintiff's prayer No. 5.
10. The court erred in granting the plaintiff's prayer No. 6.
11. The court erred in granting the plaintiff's prayer No. 7.
12. The court erred in granting the plaintiff's prayer No. 8.
13. The court erred in over-ruling the defendant's motion to direct a verdict for the defendant at the conclusion of the plaintiff's evidence, and in again over-ruling the renewal of this motion at the completion of all the evidence.
14. The court erred in refusing the defendant's prayer No. 1.
15. The court erred in refusing the defendant's prayer No. 3-A.
16. The court erred in refusing the defendant's prayer No. 4.
17. The court erred in refusing the defendant's prayer No. 7.
18. The court erred in refusing the defendant's prayer No. 9.
19. The court erred in refusing the defendant's prayer No. 10.
20. The court erred in refusing the defendant's prayer No. 12.
21. The court erred in permitting the jury to asses damages for conscious pain and suffering under the declaration as amended more than two years after the right of action accrued.

JNO. S. BARBOUR,
Attorney for Defendant.

To Messrs. Daniel W. O'Donoghue, Arthur A. Alexander, Attorneys for Plaintiff:

Please take notice that the above motion will be for hearing before Mr. Justice Gould on November 13th, 1915.

JNO. S. BARBOUR,
Attorney for Defendant.

Supreme Court of the District of Columbia.

Saturday, December 11, 1915.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * * * *

This cause coming on to be heard upon the motion of defendant filed herein by its Attorney of record for a new trial, it is considered that said motion be, and hereby is overruled, to which defendant notes an exception, and judgment on verdict is ordered.

Therefore it is considered that the plaintiff herein recover against the defendant herein the sum of Seven thousand, five hundred dollars ($7,500.00) with interest thereon from this date, being the money payable by said defendant to the plaintiff by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

The defendant by its Attorney in open Court, in the presence of Attorneys for plaintiff, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond on said appeal to operate as a Supersedeas, is hereby fixed in the sum of Ten thousand dollars ($10,000.00).

Memoranda.

January 4, 1916.—Supersedeas bond, $10,000, approved and filed.

January 17, 1916.—Time to submit Bill of Exceptions extended to, and including, February 8, 1916, and to file Transcript to, and including, March 2, 1916.

February 8, 1916.—Bill of Exceptions submitted.

Objection, &c., by Plaintiff to Bill of Exceptions.

Filed February 8, 1916.

* * * * * * *

1. The plaintiff, by her attorneys, objects to the Bill of Exceptions in this case, copy of which was submitted to the attorneys for plaintiff on January 29, 1916, at 3:00 o'clock P. M., being approved by the Court; the ground of the objection being that said copy was not submitted to the plaintiff, or to her attorneys, within the time prescribed by Rule 48 of this Honorable Court.

2. Without waiving, but expressly reserving, her above said objection, the plaintiff, by her attorneys, objects to the Bill of Exceptions in this case, copy of which was submitted to the attorneys for the plaintiff on January 29, 1916, at 3:00 o'clock P. M.; being approved by the Court, on the ground that said Bill of Exceptions,

(*a*) Will not "present to the appellate court" a true, accurate and complete statement of all the matters that are necessary to be stated therein "to explain the bearing of the rulings upon the issue or questions involved";

(*b*) In many places, "the substance of all the evidence offered in anywise connected with and having relation to the proposition or propositions in respect to which the proof is supposed to be defective" are not "set out in a narrative form, as far as practicable."

3. The plaintiff, by her attorneys, without waiving, but expressly reserving her objections as hereinbefore set forth, objects to said Bill of Exceptions being approved by the Court until the following amendments and corrections have been made therein:

(*a*) Strike out page No. "1", and substitute therefor pages No. "1" and "1-*a*" prepared by plaintiff and submitted herewith;

(*b*) Insert as a new page, in its proper place, page No. "22-*a*" prepared by plaintiff and submitted herewith.

(*c*) Insert as a new page, in its proper place, page No. "31-*a*" prepared by plaintiff and submitted herewith.

(*d*) Insert as a new page, in its proper place, page No. "69-*a*" prepared by plaintiff and submitted herewith.

12 (*e*) Insert as a new page, in its proper place, page No. "70-*a*" prepared by plaintiff and submitted herewith.

(*f*) Insert as a new page, in its proper place, page No. "72-*a*" prepared by plaintiff and submitted herewith.

(*g*) Insert as a new page, in its proper place, page No. "78-*a*" prepared by plaintiff and submitted herewith.

(*h*) Insert as a new page, in its proper place, page No. "78-*b*" prepared by plaintiff and submitted herewith.

(*i*) Insert as a new page, in its proper place, page No. "80-*a*" prepared by plaintiff and submitted herewith.

(*j*) Change the numbers and positions in said Bill of Exceptions of pages 78, 79, 80, 76, and 77, to the numbers and positions therein of 76, 77, 78, 79 and 80, respectively.

(*k*) In said Bill of Exceptions make the corrections, amendments or additions, and omissions, as hereby proposed by plaintiff as indicated in typewriting of red color, or by red pencil, on the pages of the said copy of said Bill of Exceptions submitted to the attorneys for plaintiff on January 29, 1916, at 3:00 o'clock P. M.; which said copy showing, in red as aforesaid, said proposed changes is submitted herewith; and said pages (after change in numbering of five pages thereof as proposed herein in paragraph 3-*j*) being all the pages thereof, except 20, 31, 36, 49, 67, 80, 82, and 84, and said ten new pages.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, February 18, 1916.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * * * *

Upon consideration of the objection of plaintiff filed herein to approving and filing the bill of exceptions in this cause, it is ordered that said objection be, and it hereby is overruled, to which plaintiff notes an exception; whereupon the Court having this day signed the bill of exceptions heretofore submitted herein, now orders the same of record as of the time of the noting thereof at the trial.

Assignments of Error.

Filed February 21, 1916.

* * * * * * *

Now comes the Defendant in the above entitled cause, by its Attorney, and files the following Assignments of Error:

1. The Court erred in refusing to direct a verdict for the defendant at the conclusion of the plaintiff's evidence.

13 2. The Court erred in refusing to direct a verdict for the defendant at the conclusion of all of the evidence.

3. The Court erred in applying the Federal Employers' Liability Law to the case stated in the plaintiff's declaration.

4. The Court erred in applying the Federal Employers' Liability Law to the plaintiff's case under the evidence.

5. The Court erred in granting the plaintiff leave to amend her declaration after all the evidence had been completed so as to permit a recovery by the plaintiff for conscious pain and suffering.

6. The Court erred in refusing to grant the defendant a continuance of the case after permitting said amendment.

7. The Court erred in sustaining the plaintiff's demurrer to the defendant's plea of the Statute of Limitations filed by leave following said amendment.

8. The Court erred in granting the plaintiff's prayer No. 3-A.

9. The Court erred in granting the plaintiff's prayer No. 4.

10. The Court erred in granting the plaintiff's prayer No. 5.

11. The Court erred in granting the plaintiff's prayer No. 6.

12. The Court erred in granting the plaintiff's prayer No. 7.

13. The Court erred in granting the plaintiff's prayer No. 8.

14. The Court erred in refusing the defendant's prayer No. I.

15. The Court erred in refusing the defendant's prayer No. III-A.

16. The Court erred in refusing the defendant's prayer No. IV.

17. The Court erred in refusing the defendant's prayer No. VII.

18. The Court erred in refusing the defendant's prayer No. IX.

19. The Court erred in refusing the defendant's prayer No. X.

20. The Court erred in refusing the defendant's prayer No. XII.

21. The Court erred in permitting the jury to assess damages for conscious pain and suffering under the declaration as amended more than two years after the right of action accrued.

22. The court erred in overruling the defendant's motion for a new trial and entering judgment on the verdict in favor of the plaintiff.

JNO. S. BARBOUR,
Attorney for Defendant.

Service of a copy of the above is hereby acknowledged this 19 day of February, 1916.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorneys for Plaintiff.

Defendant's Designation of Record.

Filed February 21, 1916.

* * * * * * *

The Clerk, in preparing the Transcript of Record in the above entitled cause, will please embody the following viz:

14 1. The plaintiff's declaration, showing the original declaration and the various amendments therein, with the date of said amendments.

2. The defendant's plea.

3. The plaintiff's joinder of issue.

4. Memo. Verdict of jury for plaintiff.

5. Defendant's motion for a new trial.

6. Memo. Continuances of defendant's motion for a new trial.

7. Memo. Defendant's motion for a new trial overruled; judgment on verdict for plaintiff; appeal noted; bond fixed.

8. Memo. Bond filed.

9. Memo. Extension of time for submitting bill of exceptions and filing transcript.

10. Notice served on plaintiff's counsel, with bill of exceptions submitted.

11. Memo. Bill of Exceptions submitted February 8, 1916.

12. Memo. Settling Bill of Exceptions.

13. Assignments of Error.

14. This designation.

JNO. S. BARBOUR,
Attorney for Defendant.

Service of a copy of the above is hereby acknowledged this 19 day of February, 1916.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorneys for Plaintiff.

Memorandum.

February 23, 1916.—Time to file transcript of record extended to, and including, March 13, 1916.

Plaintiff's Designation of Record.

Filed February 23, 1916.

* * * * * * *

The Clerk, in preparing the Transcript of Record in the above-entitled cause, will please embody, in addition to parts of Record designated by defendant, and in proper chronological order in said Transcript, the following, viz:

1. In transcribing declaration, the two amendments which were inserted in ink on last page of declaration should be copied in italics, with notes "(1)" and "(2)" respectively thereafter; and then with foot-notes at bottom of page reading respectively: "(1): amendment allowed Oct. 20, 1915: and "(2): amendment allowed Oct. 29, 1915."

2. Minute Book 62, f. 105: Oct. 20, 1915: copy same.

15 3. Minute Book 62, f. 120: Oct. 27, 1915: Memo. "Plaintiff discontinues 1st and 2nd counts of declaration."

4. Minute Book 62, f. 121: Memo. "Leave is hereby granted to amend the 4th count of declaration by inserting the words 'conscious pain and suffering and in the,' which is accordingly done": Oct. 29, 1915.

5. Copy "objections and Amendments and Corrections proposed by plaintiff to Bill of Exceptions prepared by Defendant", filed and submitted Feb. 8, 1916. (copy only first two pages).

6. Copy, exact, of Minutes of Feb. 18, 1916, showing overruling of plaintiff's objections: plaintiff's exception: and settling of Bill of Exceptions.

7. This designation.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 26, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 56581 at Law, wherein Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, de-

ceased, is Plaintiff and Washington Railway & Electric Company is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 6th day of March, 1916.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

In the Supreme Court of the District of Columbia.

At Law. No. 56581.

ANNE CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Plaintiff,

vs.

WASHINGTON RAILWAY AND ELECTRIC COMPANY, Defendant.

To Messrs. D. W. O'Donoghue, A. A. Alexander, Attorneys for Plaintiff:

GENTLEMEN: I am herewith handing you copy of the proposed Bill of Exceptions in the above entitled cause, which you are
16 also notified will be presented to the Court to be settled on the 8th day of February, 1916, at 10:00 o'clock A. M., or as soon thereafter as the attention of the Court can be obtained.

JOHN S. BARBOUR,
Attorney for Defendant.

Service accepted January 29", 1916, 3 p. m.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorney- for Plaintiff.

Filed Feb. 18, 1916.

[Endorsed:] In the Supreme Court of the District of Columbia. At Law. No. 56581. Ann Catherine Scala, Admx., Est. Alvin Joseph Scala, Plaintiff, vs. Washington Ry. & E. Co., Defendant. Notice. Clerk please file. Jno. S. Barbour, Att'y for Defendant.

In the Supreme Court of the District of Columbia.

At Law. No. 56581.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased, Plaintiff,

vs.

WASHINGTON RAILWAY AND ELECTRIC COMPANY, a Corporation, Defendant.

Bill of Exceptions.

Be it remembered that the above entitled case being called for trial on the 20th day of October, 1915, and on that date and at that time the attorneys for the plaintiff and the attorney for defendant being present in Court, thereupon counsel for plaintiff asked leave of the Court to amend the fourth count of the declaration by inserting in the 15th line of the last page thereof, after the word "hemorrhages," the words: "and causing him to suffer intense pain and injuries," and thereupon counsel for defendant stated to the Court that he did not object to the allowance of said amendment; and thereupon the Court allowed said amendment, and the case was continued and set for trial the following week.

And be it remembered that the above entitled cause coming on for trial on the 27th day of October, 1915, before the Honorable Ashley M. Gould, Associate Justice of the Supreme Court of the District of Columbia, and a jury empaneled and sworn to try the issues between the parties, counsel for the plaintiff stated that plaintiff elected to proceed, for the purposes of the trial, under the 3rd and 4th counts of the declaration and that the 1st and 2nd counts of the declaration were withdrawn; and thereupon counsel for the plain-
17 tiff made an opening statement to the jury on behalf of the plaintiff, part of which said opening statement was as follows:

"* * * He (plaintiff's intestate) was found there near the side of the track—the car stopped after a signal was given, and he was found there, taken on a car after some little delay, and carried to Georgetown, and after some little delay, taken to Georgetown University Hospital, where he died as the result of these injuries.

We propose to show you, however, that he lived for some time, probably an hour, after the accident, and that he suffered intense pain and agony during that time as a result of these injuries that were caused, as we propose to show you, by the negligence of the defendant company in putting that pole that near to a car that had a running-board on it—a summer car—when the conductor had to move along that running-board to collect the fares.

He suffered intense pain and agony. We will claim damages for that as well as for the wrongful death of the young man, for the benefit of his mother and father."

And thereupon the plaintiff, in order to maintain the issues on her part joined, produced as a witness on her behalf:

ANN CATHERINE SCALA, who being first duly sworn, testified that she was the plaintiff in this suit as administratrix of the estate of her son, Alvin Joseph Scala, deceased, who was born on the 29th of March, 1895, and who was 18 years old at the time of the injury; was unmarried, and lived home with plaintiff and her husband, Francis William Scala, a painter by occupation; that her intestate started to work for Woodward & Lothrop at the age of 16 as a bundle-wrapper, and received $4.00 per week, which he brought home to her every week to take care of the house, to live off of; that he had been employed by the Washington Railway and Electric Company about one year on the 28th day of June before the accident. He was killed the 8th day of July; that he brought her $2.00 every day; she did not inquire what his salary was; he always brought her $2.00 when he was regularly paid. Lots of times he would not work the whole day until the last time he got on a regular run. She could not state exactly how long he had had a regular run, but had worked out here four weeks steadily, straight through, without a day off, and had been contributing $2.00 every day to her support and to help support the family; that he worked sixteen hours a day; had eight hours off and sixteen on; he was her main support; gave her all he made all the time from the time he was a boy up, he always gave her what he made. Was never a boy to throw away anything, and always brought home everything he made, and was not contemplating marriage that she knew of. He was a baby to her and she used him just like that. He weighed 179 lbs. and was 5′ 11″ high at the time of *of* this accident, his health was fine; it could not have been any better. Her other family consisted of two girls, one seventeen and one thirteen, and the decedent was an only son, and her eldest child. None of the other children contributed to her support and she had
18 been appointed Administratrix of his Estate by the Supreme Court of the District of Columbia and her letters are still in force and effect. She never knew him to take a drink in his life, or smoke a cigarette. On this very day he left home he was perfectly healthy, and in a pleasant humor; never saw him in any other way. He was always pleasant and in good condition. And as usual he had had nothing to drink—never knew him to take a drink. It was a quarter past ten on the night of the accident when she first heard of it, and she went to the Georgetown University Hospital to see him and found his body there. He was dead, but was not cold when she got there; he was warm when she got there.

Upon cross-examination she stated that a family record had been preserved with the date of her son's birth by an entry made in a Bible which she had at her home and would produce. When asked how she got the information as to her son's weight she replied "He was weighed and told me how much he weighed," just about two months before his death, because he got stouter; that she knew he was 5′ 11″ high because he was measured by a friend of his, his brother-in-law, whose name was Rogers, just about two or three

months before his fall; that her son "Was running out on this regular run out to Glen Echo on the Cabin Johns Line. He had been running for a month ever since the line had been opened." She did not "know of" his running on that line before that, and he had never told her anything about it; that she did not know his runs. When asked how she knew he worked sixteen hours a day she replied "I know from the time he went to work and the time he came home." He was away from home sixteen hours, and she "used to ask him to come home in between times and he said he could not because they swung over hours and he had to be right there at the barn to take his car when it was due. He could not get home." She stated that she would recognize the signature of her son if she were to see it, and when presented with a paper marked "For identification, Defendant No. 1," and asked "Is that his signature?" replied "It does not look like it to me," but would not say that it was not his signature, but did recognize his photograph attached to the same paper; and in reference to a second paper marked "For identification, Defendant No. 2," when asked, "Do you think that is his writing?" said "yes; it looks like what I have at home." Said two papers were not here offered in evidence.

Mrs. FRED G. TARBELL, another witness produced on behalf of the plaintiff, testified that she remembered the accident that occurred on a car running from Georgetown out to Glen Echo on the 8th day of July, 1913, in which a conductor was injured named Scala; that she was a passenger and seated on the front seat, right next to the motorman, out on the front dashboard. That Mrs. Birge was with her, and no one else. She was on her way to Glen Echo, Md., from the District of Columbia; that she noticed the Conductor on that occasion; and remembers the accident; that in her opinion the car
19 was going between 25 and 30 miles an hour just before and at the time of the accident. It was going very fast; that she had ridden on cars a great deal and had been in automobiles; that the car was going about as fast as a railway train might go; a steam railway, an accommodation train, about 30 miles an hour. That she lived along this line sometime back; that on this occasion and just before the accident occurred the conductor had passed up and spoke to the motorman and then started back after collecting fares, and then she heard a thud and looked back and saw him hurled off the car, and he was catching from pole to pole, passing down on the running-board, and the car pushed us out of the seat.

By Mr. O'Donoghue:

Q. What pushed you out of the seat?

A. The car was going so fast when they tried to stop it after someone hollered it threw us backwards.

That it was going so fast at the time she saw the body fall and she looked back. When asked what had attracted her attention to this conductor before the accident the witness replied: "Mrs. Birge said, 'Did you notice his big brown eyes', and I started back to look at them, and then I saw his body fall."

By Mr. O'Donoghue:

Q. So that is how you happened to turn around?
A. Yes; otherwise I would not have been looking back.
Q. What was the appearance of the young man?
A. "He was dark and had great large brown eyes. I guess he was nearly six feet tall. He looked tall."

That he was a fine looking young fellow; that she turned and he was holding on to the stanchion when he was struck. He had both hands on, reaching from handle to handle. That she heard the thud and then saw him in the air, as it were, falling. She did not notice him slip or fall off the car before he was struck. The car turned a curve and was going so fast that something struck him and he fell right off; it was right after he turned a curve that the accident occurred, but she could not tell how long afterwards.

By Mr. O'Donoghue:

Q. Was he swinging out unusually far from the car or the stanchions or footboard?
A. Yes, is seemed to me he was clinging closer because the space was so narrow. He was not hanging out at all."

That he was not trying to "show off;" that at the time he was struck he was collecting fares; moving along the running-board. That after the accident occurred the car stopped suddenly and the motorman sort of let go the handles and looked frightened; then another man ran up and grabbed the car and he looked to me like he was going to faint, the motorman. Then the car backed and waited for another car to come from Glen Echo toward the city and take the body, "but my, it was a long time."

She did not see the young man after he was injured; she did not know whether he was dead or whether he was suffering.

20 On cross-examination she stated that she did see this young man when he was struck; that she was sitting on the front seat and had turned around; that the lady with her, Mrs. Birge, remarked about what a young looking man and what nice eyes he had. "I just turned naturally to see his eyes."

By Mr. Barbour:

Q. He had not been struck when you turned?
A. I watched him go on down the runningboard, and then just as the car turned—it was going so fast and turned—and then he was struck then.

That at this time—when she saw him struck, he was passing from those poles—it was an open car, of course, passing from pole to pole, and the car gave a sudden lurch and he was struck. "And then all I saw was the body going backwards."

By Mr. Barbour:

Q. I understood you to say that he seemed to be standing in closer

to the car than usual, instead of being farther out than usual. Was that the impression it made on your mind at the time?

A. I think they are all careful going up the road, because the passageway is so narrow at different places along the road.

Q. And he was in closer? Instead of hanging out he was closer?

A. Oh, he was not hanging out at all.

That she had lived in Glen Echo for two years and went over this car line daily, every day; sometimes twice a day. That as soon as the accident occurred the car stopped, as soon — they could possibly stop it. That she did not see a blaze in front. That she remembers signing a written statement of the occurrence. When asked if, therein in response to this question: "The car was stopping or starting. Did it do so with a jerk or in an unusual manner?" she did not say therein that it stopped so suddenly the trolley fell off and there was a blaze in front of the car, she replied: "It has been a long time ago, and maybe I did not remember that: it is hard to remember three years back." That she remembers that the decedent said something to the conductor prior to the occurrence, but the decedent was not after the motorman always to go on, and did not keep urging him to go, saying "Let's go"; and referring to the written statement said she did not remember saying that "His remark every time to the motorman was 'let's go' and that she did not remember having made that statement, but after having a statement read to her to the following effect "He kept looking back all the way out before he signalled the motorman to go ahead. His remarks every time to the motorman were 'Let's go.'" she said: "That was after he stopped: everytime he stopped he said 'Let's go.'"

Q. You recall it now, then?

A. Yes. You see it is so hard to remember three years back.

That her memory is a little defective about those things. That she was sure he had hold of those stanchions with both hands at the time he was struck. He stepped holding from one to the other. He was going from one to the other: "He was just catching from one to the other."

21 By Mr. Barbour:

Q. What portion of his body did you see struck?

A. Oh, I could not see that. All I saw was his body hurled off the car.

Q. You did not see his body come in contact, then, with any object?

A. I just saw the body going, but it was a narrow place and the car was going so fast.

Q. I just wanted to get that clear, that you did not see his body come in contact with any object?

A. The poles are very close to the place——

Q. Yes, but I want to know if you saw his body come in contact with any object?

A. No.

On redirect examination.

By Mr. O'Donoghue:

Q. You heard——

A. I heard a thud. I know that he struck a pole, but I did not see it.

Q. You heard it, though, did you not?

A. Yes, I did. I heard a terrible thud and the body must have struck a pole.

Q. And you say that just before that the car had given a lurch. What do you mean by a "lurch"; a side movement?

A. Swaying; yes; it was going so fast.

Q. A roll?

A. Yes, sir.

Q. Has this company a waiting station on 36th Street, near Prospect Avenue, there near the corner?

A. Yes; a little farther up the street.

Q. Do you know whether they haul freight on this line for people going up along there?

A. Yes.

That the railroad company got her name that night on the car. The car on which she was riding was a Summer car which had seats running crosswise of the car and a stepping board all along on the north or outside of the car.

THEODORE H. HARDY, JR., a witness called for and on behalf of the plaintiff, testified that he was in the cleaning and dyeing business with his brother-in-law, M. L. King, #834 First Street, Northwest. On the evening of July 8, 1913, he was a passenger on a car running from Prospect Avenue and 36th Street, in Georgetown, out to Glen Echo, in which an accident occurred and in which the conductor was fatally injured. That he was sitting on the front seat directly in behind the motorman, facing to the front. The car was going at a pretty good rate of speed. "I should say between 15 and 18 miles an hour, as fast as the cars generally go out there in the summer time at a pretty good rate of speed."

"The conductor was standing directly in front of me speaking to the motorman, and he started to the rear of the car and had gotten about four or five feet steps, I should judge, when I heard a thud as though he had struck something. The motorman stopped the car as quickly as possible, and we ran back and picked him up; he was bleeding very bad;" right down in his crotch; he was still living then.

22 By Mr. O'Donoghue:

Q. He was still living then, though?

A. He was still living, and he said, "Oh, my God."

Q As regards suffering, what can you say?

A. He was suffering pretty bad.

Q. He was conscious?

A. Well, he said, "Oh, my God." I suppose he was conscious.

He was going along in his regular course of business as any other conductor would do; he was standing there speaking to the motorman; he did not notice anything unusual in the manner in which he walked or started toward the rear of the car.

By Mr. O'Donoghue:

Q. Was he leaning out unusually far on the car?

A. No; he was standing close. He was standing there just like any other conductor would stand on a car. He had a pretty good hold on the stanchions, or uprights; he was standing there. The motorman was in front of the car. I guess he had hold right in front of the car there. I do not know, you understand; I am judging, that is all.

Q. What was the first thing unusual that attracted your attention?

A. Why, I heard a sort of a thud as though he had struck something. That is all. I did not expect this thing. That he knows where McCoy's Station is; the accident was just beyond McCoy Station, three or four poles beyond.

That before this thud he did not notice anything unusual in that conductor or his manner or his stand or hold; after the car stopped witness got off the car and went back and "we picked him up;" that he was about ten feet from the pole. The witness did not notice the pole that struck him; that he was there between three and five minutes before he was placed upon another car to be taken home, and it started right in. Witness did not go in with it.

Q. During all that time what was the condition of the man as you observed it?

A. The man was suffering pretty bad. He was cut all to pieces. He was bleeding. I remember I picked him up and right in here (indicating) it was just like a piece of raw liver.

That he could not state what part of the body struck the pole.

Upon cross-examination the witness stated that he was sitting directly behind the motorman, facing the same way the motorman was and

Q. And this young man when he came down on the running board passed out of your sight?

A. When the conductor went to the rear of the car he passed out of my sight," and the witness never saw him thereafter until he picked him up "and that is all I know."

JOHN H. BURROUGHS, another witness called on behalf of the plaintiff, testified that on or about the 8th of July, 1912, he only saw Conductor Scala when he was in an ambulance being taken to the hospital at Georgetown, at 36th Street and Prospect Avenue, when they were taking him from the car to the hospital.

23 Q. Was he living at that time?

A. Well, he had life in him, that was about all you can say.

Q. Did you hear anything?

A. You could hear a little groan from him.

Upon cross-examination he testified as follows:

By Mr. Barbour:

Q. He was unconscious at that time, was he not, Mr. Burroughs?
A. Yes, sir.

Q. And being further questioned on redirect examination, he testified as follows:

Q. Do you know whether he was unconscious or not, or whether he was in conscious pain when he was groaning?
A. No, I could not say. For the crowd, all I could hear was this groan.
Q. You could not say whether he was conscious or unconscious?
A. No, I could not say whether he was conscious or unconscious.
Q. All you heard was his groan?
A. Yes.

Mrs. EMMA E. KNOWLES, another witness called on behalf of the plaintiff, testified that she resides at 2625 Prospect Avenue; that her husband keeps a lunch room on the corner of 36th Street and Prospect Avenue, and the cars going out to Glen Echo start there and go out to Glen Echo and Cabin John. That is a junction. Some of the cars go through and some of them start there, and there is a waiting station at 36th Street, between Prospect Avenue and N Street, for people travelling along that line.

Counsel for defendant admitted the fact that there is a waiting station on 36th street between Prospect and N Street.

Witness had known the decedent for a couple of months, and on the night of July 8, 1913, she was getting ready to go to the moving pictures, and just as she was going across the street someone said some[illegible]e had gotten hurt on the road. The car had not quite stopped yet, and witness jumped on the platform because she was excited and wanted to see. "No sooner had I got on the car than I took my hand and put it on the man on the floor of the car and someone said, 'Who is it?' I said 'It is Scala.' * * * I stayed there and rubbed the man's forehead and he opened his eyes and looked kind of rattled like and groaned." That she stayed there with him about five minutes, and no one came around to do anything with him, but she went away to get some water; that there was a crowd there when she got back; that it was 15 or 20 minutes before he was taken to the hospital, which is about a square from where he then was; that he laid there on the car.

Q. What can you say with regard to his suffering any pain about that time?
A. He just simply groaned. That is all I know.

The witness was not cross-examined.

24 Mr. BURRELL MARTZ, another witness, was called on behalf of the plaintiff and testified that he was a Collector for the Jersey Milk Company and on the night of July 8, 1913, when a passenger on the car from Georgetown to Glen Echo, on which the conductor was fatally injured; that he was about the middle of the car on the end of the bench on the side on which he was injured on: the car was not crowded, about half full. Was seated about the middle of the car, right on the end of the bench in the right-hand side, near the running board. That he had noticed the conductor before the accident. The first time he had noticed him he had been walking along and laughing and talking to the motorman.

Q. What next occurred?

A. The next was a large sound, and I heard the jar of the car like it had run over something hard and heavy.

Q. Then what did you next observe?

A. Several of them hollered that the conductor was struck or off the car. He ran about a block before they missed him off of there.

Witness did not see his body falling from the car. It was done so quick he didn't notice it. The car was running very fast. He did feel the jar which seemed to shake everybody; it shook the car like it had run over a rock or something. That he got off the car. That the car went about a block before it could stop. After they got off the car they ran back east of the car almost a block; it was dark along there, there were no lights. When they found the man he was sitting down; he had dropped down with his head towards his knees. All doubled up, kind of sloping down. He hit a bank and sloped down against the tracks or twisted almost.

Q. What condition was he in?

A. He never said nothing. He never made a noise or anything.

Q. Was he moaning or groaning at the time?

A. I could not hear a noise.

Q. You could see he was not dead, couldn't you? You could observe that he was not dead?

A. Yes. I didn't know that, but there were several gentlemen had hold of him.

The witness said he had not stated to Mr. Alexander, of Counsel for the plaintiff, in making a statement with regard to the case very recently, that he "observed he was not dead but was moaning and groaning:" but that witness had said "He sounded like he was moaning."

Q. He made some sound of that kind?

A. Yes, sir; a little noise.

Q. And he was not dead?

A. No, sir; I don't think he was quite dead. There was life in him.

On cross-examination this witness stated that he was sitting about the middle of the car, on the cross seat. That he did not see the conductor when he fell from the car; it was done so quickly that he did not know how far the body, when it was found, was from the pole; there was so much excitement there. He was gathered up as quickly

as they could; another car came up from the rear running our
25 way. It was right on a bend, and somebody hollered there was another car coming and they ran back with a light.

Questioned by the Court, the witness replied:

Q. The man who was injured passed you on the running board, did he?
A. Yes, he passed me on the running board.
Q. Going back toward the rear of the car?
A. He went to the front of the car.
Q. He went to the front of the car?
A. He had been going along collecting fares.
Q. And he passed you in going to the rear of the car just before the accident?
A. No, he went past, going to the front.
Q. Was he in front of you when he was struck?
A. Sure.
Q. And you did not see him?
A. No, sir. I seen him standing there. I had been noticing him talking and laughing.
Q. What hour of the night was it?
A. I suppose about eight o'clock, something like that. I don't know exactly.
Q. It was dark?
A. Yes, sir.

Mr. JOSEPHUS PERRY, another witness called on behalf of the plaintiff, testified that he was in the ice business in Georgetown, and was a passenger on the 8th of July, 1913, on a car running from Prospect Avenue and 36th Street to Glen Echo, on which a conductor was fatally injured; that he was seated about the third seat from the rear end, to the right, near the running board, where the conductor went along. He saw the conductor before the accident. "When I first paid attention to him he was leaving the front end coming down the running board. He had started down. He started as if he was going to come toward the back end after the fares." There was nothing unusual in the manner in which he started back.

The next thing occurred I saw him falling from the car. After the car had stopped we went back and found him lying along beside the track. With his head down toward town, toward Washington.

Q. Did you hear any thud?

A. I saw the object just before it fell. As far as hearing anything, there was no sound at all, not as I heard. I don't know what caused him to fall off. Could not say. Was back in the third seat on the right side.

To his recollection, the accident occurred about the third or fourth pole beyond McCoy's Station, going west.

That after the accident they went back and found the man and stopped the other car. Decedent was pretty well rolled up in the

dirt, and he had nothing to say. He made a moan or so, and that is about all I heard of it.

Q. You heard him moaning?

A. Yes, sir. That several other fellows put him on the car.

On cross-examination the witness stated that when he first saw this man and about or just prior to the moment when he fell from the car, "His face was towards the inside of the car" "in between the front railing and the railing of the next side."

26 Q. Do you know Mr. Whalen?

A. Yes, sir.

Q. Was he there?

A. He was just behind me.

Q. Did you see Mr. Whalen make a grab for this man?

A. I saw Mr. Whalen make a grab for something, yes.

Q. Then what happened when Mr. Whalen made that grab?

A. He fell right off the car right down onto the ground.

Q. When you saw Mr. Whalen make that grab, was the man apparently coming in toward the car or going out from the car?

A. Coming in.

Q. The upper portion of his body was coming in toward the car?

A. Yes, sir; the same as if you would throw a ball or anything like that against a car, it goes forward and then back.

Q. And you say you saw Mr. Whalen make this grab for him?

A. I saw Mr. Whalen make a grab for him; yes, sir.

Q. And then the man fell after that?

A. Yes, sir.

Q. How fast was that car going at that time?

A. I suppose it was going between 18 and 20 miles.

Q. Was there anything unusual about the speed of the car?

A. No, sir; nothing at all, sir.

Q. Did you notice anybody else standing on the running board of the car that night?

A. No, sir.

On re-direct examination the witness further testified as follows:

Q. You do not know what caused the conductor to come in toward the car?

A. No, sir; I do not know what caused that.

Q. He came in toward the car, toward where Mr. Whalen was?

A. Slightly, so; yes, sir.

Q. You do not know what knocked him in or drove him in that way?

A. No, sir; I do not know what caused him to come in that way.

Dr. WILLIAM F. O'DONNELL, another witness called on behalf of the plaintiff, testified that he is a practicing physician in the City of Washington; on the night of July 8, 1913, was at Georgetown University Hospital when this young man Scala was brought in, though he did not know his name. He was called down about three or four minutes after he was brought in. Dr. Offutt was there at the time.

Dr. Offutt is now in Fort Slocum, New York. Dr. McCormick was there also. He is now practicing in New Jersey. "The only injury I remember seeing was a compound fracture, a comminuted fracture of the sacrum, and I assisted Dr. McCormick." "That is at the lower portion of the spine, down next to the coccyx, away down low. I assisted Dr. McCormick in endeavoring to check the flow of blood from this large wound, which we were unable to do. We patched it first with sponges, but the gauze sponges were entirely too small. The opening was large enough for a man to put his hand in there. Dr. McCormick endeavored to get sterile towels up there, but his efforts were ineffectual, and we were unable to stop the flow of blood."

Q. How long after the man arrived at the hospital did he die?

A. As far as I know, I judge it was about two or three
27 minutes after I saw him. He stopped breathing about two or three minutes after I saw him.

Q. How long had he been at the hospital before you saw him?

A. I should say maybe three or four minutes.

Q. He was alive when he was brought to the hospital?

A. Apparently so, yes sir.

Upon cross-examination the witness stated that the injury was in the neighborhood of the lower portion of the spine; that the opening was in the same position; that there was no involvement of the hip.

Q. Was the man conscious or unconscious during the time you saw him, Doctor?

A. I am not in a position to say. I confined my efforts with Dr. McCormick to the lesion low down.

Q. Don't you know that he was unconscious, Doctor?

A. Apparently so; yes, sir.

That Dr. White was not present then.

Dr. C. S. White.

Owing to the absence of Dr. White, from the city, but who had been subpon-ed on behalf of plaintiff, it was agreed that his finding or his indication on his schedule of the autopsy might be offered in evidence in lieu of his testimony, in the words and figures following:

No. —. Place: D. C. Morgue. Date: July 10/13. Hour: 11 A. M.

Name: Alvin Scala.

Color: W. Age: 16 (?). Weight: 170. Height: 5′ 9″. Sex: M.

Operation: None.

Previous History: Fall from car at 36 & Prospect ave.—Died in few minutes.

Clothes: None.

General Condition: Abrasion r. side of face; inner side of both

legs and back. Frac. left hip bone. Large hemorrhage over lower spine.

Brain: —.
Lungs: —.
Heart: —.
Spleen: —.
Kidneys: —.
Urine: —.
Liver: —.
Gall bladder: —.
Pancreas: —.
Stomach: —.
Intestines: Hemorrhage behind intestines.
Genital Organs: —.
Remarks: Fracture both hip bones. Head of r. femur (large bone of thigh) was forced in pelvis.

Evidence of Violence: (on the schedule was printed front
28 view, and a rear view, of a human body; which were marked in ink, as follows: Marks on right side of head and word: "Abrasion." Marks on inner sides of both thighs and word "Abrasions." Marks at base of spine in pelvic region and words "Large Hemorrhages."

Present at Autopsy: Schoneberger — Rundell.
Cause Death: Fracture of pelvis—Hemorrhage & shock.
Performed by C. S. White.

Mr. B. Peyton Whalen, another witness introduced on behalf of the plaintiff, testified that he was Sheriff of Montgomery County, Maryland, and a passenger on the car on the 8th of July, 1913, on which this young man Scala was fatally injured, on the line between Georgetown and Glen Echo, that he was sitting on the front seat on the inside, not outside on the platform—I mean outside the vestibule. I was on the inside of the car, on the front seat facing the front of the car. (Seats running crosswise.)"

Q. Will you please tell us what occurred there? When did you first see the conductor or notice him?

A. I seen the conductor back on Wisconsin Avenue when I got on the car. At that time he went up to the front into the vestibule. I did not pay any particular attention to him more *that* he went out there.

Q. And by "vestibule" you mean the front platform?

A. The front platform or vestibule, they call it. I forget which.

Q. Had you been talking to him?

A. I spoke to the fellow when I gave him my fare perhaps at the time. I do not recall the words now.

Q. What was his condition then?

A. There was nothing wrong with him. As far as I know he was perfectly sober, attending to his business.

Q. Just tell us what occurred.

A. He stepped backwards or stepped down onto the running board and came back along the running-board of the car, and

had his right hand ahold of the first upright post. He apparently missed or lost his footing, and he was a little clumsy, and he grabbed with his left hand around me. I was sitting there near the running board on the front seat and his left hand did not seem to catch the post. Anyhow, he was off the car in an instant. It kind of throwed him back. As I saw him do that I grabbed him but owing to the distance away I did not get any hold on him and at that time the pole struck him."

"The pole struck him at that time and drove him into me."

Q. You saw that?

—. Yes, sir.

Q. And it drove him right into you?

A. Yes, sir. I am a little bit ahead of my story. Just at the time I grabbed him was when the pole struck him, but, as I say, he fell down and I could not get ahold of him on account of the awkward way I had to grab him, and I did not get him.

Q. Was his hold of the stanchion at the front of the car firm, or would he have fallen had it not been for the pole striking him?

A. I suppose so. His hold apparently seemed to be firm. I am not able to say more than my observation of the man.

29 Q. Then how did this pole strike him, and where did it strike him?

A. Along on the rump.

The car was going at a moderate rate of speed, I would say, not exceedingly fast.

Q. And that drove him into you, and you tried——

A. (Interposing.) Then is when I tried to grab him and when I missed him.

Q. And then he fell?

A. He fell then.

Q. From the car?

A. He fell right off the running board.

* * * * * * *

Q. How many poles beyond McCoy's Station?

A. My recollection is it was counted the next morning to be four poles. McCoy's Station, you say?

Q. Yes.

A. There was some station there but I have forgotten the name of it.

* * * * * * *

Q. You went up there and saw the pole and the car, I believe, on which he had been conductor?

A. Yes, sir; the next morning.

* * * * * * *

Q. Was the distance measured there?

A. I recall the distance being measured, but just the distance I do not recall.

The witness was unable to indicate the distance. He said "I guess it was the average distance of the poles away from the track."

Q. Did you notice the distance of this particular pole as compared with the other poles?

A. There was some discussion about that.

Q. Who took the measurements for the railroad?

A. Some of the officials. I will not say who.

Q. They took photographs, did they not?

A. Yes; some photographs were taken, as I understand it, or as I recall.

Q. When those photographs were taken who was the man who stood on the running board to indicate the place of the conductor?

A. There were several men on the running board. I will not say positively. I think it was Mr. Moffett.

That there was some discussion about whether the pole that struck the man was closer or not as compared with the other poles along there; but he could not say as to the positive measurement.

The witness stated: "I was the first one that got back to him after the accident. * * * He was lying face down with his head toward Washington and his feet toward Glen Echo. I stopped one of the other cars and helped to place him on the car which carried him to the hospital.

The witness came to the hospital with him.

Q. How about his suffering and condition coming down on the car?

A. He was not conscious. He did not appear to be conscious at all. He was groaning when I got back to him, but whether he had ceased groaning before he got to the hospital I will not say positively.

Q. He was groaning?

A. He was groaning at the time when I got back to him, when he was lying on the ground.

Upon cross-examination this witness stated that at the time of the accident he was facing the same way the motorman was and the same way the car was going, and opposite a seat that faced towards where he was sitting, and noticed this young man leaving the motorman's platform and step down onto the running-board facing backwards, and coming towards him.

Q. Before he came in contact with anything he seemed to lose his footing and slip?

A. He was not in an upright position when the pole struck him, no. You see two years have elapsed and it is pretty hard to state exactly how the thing did happen, but he seemed to have trouble getting his footing. It appeared to me at that time that he seemed to have considerable trouble in getting his footing.

Q. Then what happened after that?

A. As I say, then the pole struck him. The car was going along and the pole struck him and drove him into me, and I grabbed for him, but I had a broken finger, or something, and I did not get hold of him.

Q. And it struck him on the rump?

A. Yes, sir; it struck him on the rump.

Q. There was nothing unusual about the speed of the car, you say?

A. I would say not.

* * * * * * *

Q. As he apparently lost his footing he sort of dropped?

A. That put him off his balance; yes, sir.

Q. Where did you catch him? Did you catch him by the lapel of the coat?

A. I caught him by the lapel of the coat, but as I say, I did not get a good hold of him. I do not know if it would have helped him if I had because he had been struck then.

Q. Had he been struck before or after you grabbed him?

A. Before.

* * * * * * *

Q. There was nothing, I suppose, to obstruct your view of this occurrence?

A. There was nothing to obstruct my view.

* * * * * * *

"I was one of the first, about the first," to go back to him. Witness could not state how far he was from the nearest pole along the track. Does not recall seeing him collect any fares after he went to front of car.

Q. You gave the motorman the bell to stop, I believe?

A. Yes, I did. I pulled the bell.

Q. He was unconscious from the time you first saw him?

A. Yes, sir. He did not speak a word. That he was groaning but did not seem to be conscious.

Witness came on the car with him to the hospital; all the way, and did not leave him. There was no delay. The cars run pretty frequently out there, and we flagged a car coming in back and we put him on the first car that came along and took him to 36th street.

When he got to him, he was lying face downward, and headed toward Washington, with his feet west. That exposed his rump.

His clothes were torn; the seat of his trousers was torn out.

31 I turned him over. I thought probably he would breathe better if there was any life in him, and so I turned him over. That his face was toward Washington, toward the East.

Upon redirect examination the witness stated that the decedent apparently had a firm hold of the stanchion at the time the pole struck him.

Upon recross-examination the witness stated:

Q. And at that time he had lost his foothold?

A. He apparently seemed to have trouble with his footing. One foot seemed—I won't say positively, but there seemed to be trouble about his foot on the running board.

Questioned by the Court:

"Q. He was standing between the two seats which face each other on the car at the time he was struck, I understood you to say?
A. Not exactly. Your Honor, Judge, he was facing a little backward. He was not facing squarely into the car but a little backward.
Q. Was he in front or in back of you?
A. In front of me.
Q. Then he was in between the two seats?
A. He was in between the two seats in that position, right like that (indicating).

The plaintiff, through her Counsel then offered in evidence, as a matter of formality,
27 Stat. at Large, 326.
28 Stat. at Large, 492.
29 Stat. at Large, 246.
31 Stat. at Large, 270.

(It is stipulated between counsel for plaintiff and counsel for defendant that said Statutes are made a part of this Bill of Exceptions the same as though said Statutes were set out in full herein.)
These were offered with reference to the articles of incorporation and amending the incorporation of this Railroad Co.

The Court: It is not denied, as I understand it.
Mr. O'Donoghue: It is not denied, but I would rather have them formally offered in evidence as it gives the facts as to the incorporation of this railroad. I want to do that in order to comply with the employers' liability act, and also I wish to offer a certificate that is on file changing the name of the corporation from the Washington and Great Falls to the Washington Railway and Electric Company.
Mr. Barbour: There is no denial of that.
Mr. O'Donoghue: I say you admit it. That is recorded in Liber No. 9 of the "Acts of Incorporation" of the District of Columbia, folio 452. That is recorded in the office of the Recorder of Deeds. It is also admitted that they own the line running out along that railroad. You admit that you own the station. You will admit that instead of my having to bring the Recorder of Deeds up here?
32 Mr. Barbour: I presume it is. It is on our right of way.
The true copy of Liber 9, folio 452, of the "Acts of Incorporation," in the Office of the Recorder of Deeds of the District of Columbia, offered in evidence on behalf of the plaintiff as above, is in words and figures as follows:

"Washington and Great Falls Electric Railway Company.

Recorded February 1st, 1902, 11:50 A. M.

Change of Name.

'This is to certify that under and in pursuance *to* Act of Congress approved June 5, 1900, entitled 'An Act relating to certain street

railway corporations owning or operating street railways in the District of Columbia,' the Washington & Great Falls Electric Railway Company and the Metropolitan Railroad Company, did on the 29th day of January, 1902, enter into a contract by their respective Boards of Directors for the reciprocal use of their roads or routes, and that such contract was approved by the written consent of the owners of record of more than three-fourths of the capital stock of each of said corporations, and that it has been determined by said Washington & Great Falls Electric Railway Company that simultaneously with the taking effect of said last mentioned contract, towit, on the first day of February, 1902, its corporate name shall be changed to 'Washington Railway and Electric Company,' said name not being in use by any existing corporation incorporated or organized in the District of Columbia. The number of Directors of the Washington & Great Falls Electric Railway Company is seven and the undersigned are a majority of the Directors of said Company. Dated January 29th, 1902.

G. W. YOUNG.
ALLAN L. McDERMOTT.
GEO. H. HARRIES.
OSCAR T. CROSBY.

(Proper Notarial acknowledgements.)
(Notarial Seals.)

Mr. O'Donoghue: It is of record that they own the right of way and the land running from Prospect Avenue up to Glen Echo, and also the railroad station on 36th Street on the east side of 36th Street, between Prospect Avenue and N Street.

Mr. Barbour: Yes.

Mr. Francis William Scala, another witness called on behalf of the plaintiff, testified that he is the husband of the plaintiff and father of the decedent; that his son lived with him up to the time of his death; that his son was unmarried; that he made $2.28 per day working for the railroad; that he gave $2.00 of it to his mother and kept the balance for himself. That he had worked for
33 the railroad company for about one year prior to his accident; had been working regularly about six weeks on the Glen Echo Line, straight through, every day. That he was to be assigned off Wednesday and was killed Tuesday night; and had not had a day off for about six weeks; that witness heard of accident about 10 o'clock Tuesday night. That he did not go to the hospital because the shock unnerved him, and they took him over to his mother. Son was 5' 11" high and weighed 179 lbs. and was 18 years old.

Upon cross-examination he stated that he found out how old his son was "according to the time of his birth;" that he was out at the barn of the Washington Railway and Electric Company, but does not know whether it was August 1, 1913, or not, and did not tell Mr. Bowen there on that occasion that he did not know how old his son was; but that he told Bowen that witness knew and that Bowen knew

s son's age. That his son was as large as any man so far as his
e was concerned—was a man's size.
Q. About the money that he earned, he never gave you any of it?
A. No, sir.
Q. You were never benefited by it at all?
A. He gave it to his mother to run the house on. I was sick at the
me.
Q. Could you know the signature or the writing of your son if you
ere to see it?
A. Yes, sir.

The paper already marked "For identification, Defendant No. 1," as identified as signed by his son.

Q. I will also ask you if that is his writing? (Exhibiting another ocument to witness.)
A. It looks very much like it.
Q. Would you say it was his writing? You would say it was his riting, wouldn't you?
A. From what little I have seen of his handwriting, yes.

Mr. Barbour: This paper is marked "For identification, Defendant No. 2."

Upon redirect examination he testified that the $2.00 turned over by the son to witness's wife went to the benefit of witness, as well as to the rest of the family.

That witness had just come out of hospital prior to that time.

Mr. Barbour objected; and Mr. O'Donoghue said: "You raised the question that he did not get any benefit."

The Court stated he testified: "it was used for the benefit of the family of which he was a member"; and Mr. O'Donoghue stated he thought Mr. Barbour "wanted to exclude him as one of the beneficiaries of the boy."

The Court: "He made that answer in response to a question."

Q. Was the money that the boy turned over to your wife and which she used, for the benefit of you, your wife, and family?
A. He was my righthand bower.

34 HERBERT S. GORMLEY, another witness called on behalf of the plaintiff, testified that he was employed by the Washington Railway and Electric Company and made measurements in regard to this pole and track just west of McCoy's Station just after this accident where this young man was killed, and that the first pole west of McCoy's Station is 4′ 8″ from the rail to the inside edge of the pole; that is, the clearance, 4′ 8″, in the clear between the rail and the pole; outside or north side of rail and south side of pole; the next pole is 4′ 6″; the next is the fourth pole above the platform, counting the one at the platform, and is 4′ 8″; the next one is 5′ 11″.

Q. That is the fourth pole from McCoy Station?
A. Yes, not counting the one at the station.

Q. That is counting the one at the station?

A. Not counting the one at the station.

Q. Well, it is the fourth pole from McCoy's Station, is that it?

A. Yes, sir. There is a pole right in the platform by the station, and I cannot make the figure out very well. If you count the pole at the station, the last one, it is four feet four.

Q. That is the pole that is in the station itself? Is it not west of the station?

A. No; it is right at the platform of the station.

Q. The fourth pole west of the station is 3′ 11″ from the rail?

A. That is right.

Q. All those measurements are made from the north side of the rail and the south side of the post?

A. It is what we call the gauge line of the rail. It is the south edge of the pole.

Q. Your measurements are made from the south side of the rail and the south side of the post?

A. Yes, sir.

Q. Did you not measure them out there that day? Could I not refresh your memory when I say this pole is 3′ 11″ that struck Scala?

A. I did measure the *car* out there, but I have no record in my book here of it.

Q. You made this drawing here, did you not?

A. Yes, sir. (Referring to a drawing of the scene of the accident afterwards posted on a blackboard in front of jury; and later introduced in evidence as Exhibit A by defendant when same witness was called as a witness on behalf of defendant.)

Q. What does this "17" up here indicate, 17 inches?

A. That means from the stanchion on the car to the gauge line of the rail, 17 inches.

Cross-examination:

The diagram above referred to was then fastened on the blackboard and the witness pointed out thereon a sectional view of the car and the portions thereof that represented the floor, the stanchion, "And this little piece here represents the handle, or what you catch hold of, and this down here marked "9½ inches" represents the running-board."

Q. Now, you have testified that from the gauge line here, the inside of the rail, to the pole out here, which is not shown on this drawing, after the fourth pole was 3′ 11″?

A. Yes, sir.

35 Q. That is 17 inches?

A. Yes, sir.

Q. You have testified that the clear from a perpendicular from the gauge line to this stanchion here is 17 inches?

A. Yes, sir.

Q. That is, then from the outside of that stanchion to the pole would be 47 minus 17, would it not, leaving 30 inches clear?

A. Yes, sir.

Q. These measurements that you refer to, where were they taken, at the level of the ground or the level of the rail, or at some other place?

A. They were taken at the level of the rail.

Q. Now, can you state as to whether or not there was more clearance as the pole arose?

A. Yes; because the poles at that point have a rake; in other words, they lean away from the track, the minimum distance is at the level of the rail, and it increases as you go up.

By Mr. O'Donoghue: Does this particular pole lean away from the track, pole #187? Is it not straight?

A. I have it marked three-fourths of an inch rake, three-fourths of an inch to the foot.

Q. It is practically straight?

A. That short distance, yes.

By Mr. Barbour: In a rise of four feet that would make a difference of 3 inches, would it not?

A. Just about; yes, sir.

Q. That is the measurement at the fourth pole?

A. Yes, sir.

Q. The measurement at the third pole was 4′ 4″?

A. I call the third pole to be 4′ 4″. Witness then, after removing from blackboard said diagram, at request of Mr. Barbour, marked on a blackboard in front of jury actual distances, in form of sketch, between stanchion and pole, at distance of 3′ 11″, actual scale.

Upon redirect examination the witness stated that these summer cars have very good springs on them, and wheels, though he was not posted on the equipment of the rolling stock; that he has noticed them lurch and sway from side to side in some cases; that he cannot state just the most they can sway or lurch when they have a good roll on, but that there is a motion to them.

Mrs. R. Evelyn Birge.

And thereupon the plaintiff, to further maintain the issue on her part, read to the jury the testimony taken during recess hour of Court Oct. 27, 1915, by consent before a notary public of the District of Columbia at the home of witness, said witness having been su-pœn-ed by plaintiff, but being unable to attend Court owing to illness, by consent to be read in lieu of her testimony in court, as follows:

That she was on the car with Mrs. Tarbell on the evening of July 8, 1913, going from Georgetown to Glen Echo, when this conductor was fatally injured; that she was sitting in the seat right back of the motorman, on the front of the car; that she had noticed the conductor just after she got about a mile out of Washington; that just before the accident happened he had just gotten up and spoken to the motorman, taking up fares as he went along, and then started back. "He put out his left hand to take hold of that thing. He took hold of it, released the other hand that way (illustrating), and about

that time he was struck." That she heard a dull, sickening
36 thud. "There was some kind of an official, I think, on the car, because he gave the emergency signal, or something, and then he rushed up and took the motorman's place and brought the car to a stop." That the conductor fell from the car after he was struck by the pole.

Q. You did not see him any more after that?

A. He just passed us, and that is the last time I saw him after he was struck." Witness stated the car was running at a high rate of speed: "As fast, I think, as I ever have ridden. We were discussing that it was an exceedingly great speed." That the car was swaying horribly; that they had just come around a curve; that it was swerving crosswise. Witness did not get off the car after the accident; witness stood up: "Everybody stood up and we did not see him at all after he was hit.

Q. Did you take any notice of this conductor, or did Mrs. Tarbell take any notice of the conductor?

A. When he went past I said something about his pretty brown eyes, or something like that, and we both noticed him, but he was very intent on his own duties, and he was collecting his fares. I think it was the second fares he was collecting, but anyway I know he was taking up fares when he passed us.

Q. Did he have hold of the stanchion the last you saw of him before he was struck?

A. Yes, he did. Both Mrs. Tarbell and I noticed that. She and I were discussing that the next day.

Q. You did not see him slip or fall off the car before he was struck?

A. No, sir.

Q. And the first thing you saw or heard unusual was what?

A. The sound of him being struck. We saw the contact.

Upon cross-examination witness stated that she did not see Scala come in contact with any pole; that she heard it; that she had her back to him. "I had just stopped looking at him just about the time he was struck." Witness had just ceased to look. "Just about the time I turned my head he was struck.

Witness stated: "I would not say that the lurch of the car threw him off", but denied that she had said that the lurch of the car threw the conductor off and that is what hurt him. And when asked: "You never signed a written statement to that effect?" Replied: "I do not think so." And when shown a document and asked: "I would ask you if that is not your signature," replied: "Yes, that is my signature. I gave that statement right after the accident, didn't I?"

Q. In that statement you said the conductor was standing on the front end of the running-board and moved back to the end of the first seat when the car lurched and threw him off. Didn't you say that?

A. If it is there I said it, but I remember the next day we were discussing about this horrible thud, you know, about him striking, and the car was rocking from one side of the car track to the other.

Mr. O'Donoghue: Was that a type-written statement you were just asking her about, Mr. Barbour?

Mr. Barbour: Yes.

The Witness: That was my signature.

37 Mr. Barbour: Who did the type-writing on that statement?

The Witness: I did, I suppose. Was the statement sent to me or did someone come for it?

Mr. Barbour: That statement was just put through the mails and mailed back by you to the company.

Question by Mr. Barbour: Did Mr. Moran talk with you about this matter at #2129 18th St. on July 9th

A. That was my residence.

Q. That was your residence at that time?

A. Yes, sir.

Q. Didn't you say this in answer to a question asked by him: "Q. Where were you at the time of the ac-ident?

A. I was sitting on the front seat back of the motorman.

Q. And what did you see of the accident?

A. Well, the conductor had been up front talking to the motorman and then he left to go to the rear of the car, and as he turned and was going back, of course, I lost view of him, and at that moment the car made a curve and gave a violent lurch and that, I have no doubt, is what caused him to fall."

Q. Didn't you say that at that time?

A. I don't know. I don't suppose he ever mentioned the fact that he was struck. That is the only reason why I did not say I thought he was struck.

Q. But did you not make the response to that question as I have just read it to you?

A. Probably.

Q. "Didn't he say: "Did you see him when he fell?" To which you responded: "No." Is that right?

A. Yes, sir. I did not see him. He just passed out of my sight at the time of the accident.

Q. Did he not then ask you: "Do you know whether he was standing or moving at the time of the accident," to which you responded, "I judged he was moving." Is that right?

A. Yes.

Q. And did he not then ask you: "Did you see him catch for the handle and miss it," to which you responded, "No, I do not know whether he did that or not."

A. He passed us and reached back just like that (illustrating) and took hold of it, and by that time, of course, I did not pay any more attention to him, as he was then out of my sight.

Q. But did you not make the response I have just read to you "No, I do not know whether he did that or not"?

A. I could not tell you whether he missed it or not. He had caught hold of it the last I saw of him.

Q. Did he not then ask you, "How fast was the car moving"?
A. Yes.
Q. And you said? "I thought a good speed, and then this awful lurch came."
A. Yes.
Q. And did he not ask you, "Where was he then," and you said, "I just lost sight of him going back." Is that correct? Did you not say that?
A. Yes, sir.
Q. Was that correct?
A. Yes, sir.
Q. And that is correct now, is it?
A. Yes, sir; except I am positive the conductor was hit—this boy was hit.
Q. You think he was hit?
A. I am almost positive he was.
Mr. O'Donohue: She says she heard it.
38 Mr. Barbour: Did you see him hit?
A. I heard this awful thud. We discussed it the next day, and then I had not thought about it until now up to this time.

PHILIP F. GORMLEY, a witness having been called on behalf of plaintiff, and having been sworn.

Mr. O'Donoghue: It is admitted that these poles out there are the same now as at the time of the accident?

Mr. Barbour: Yes; I do not think there has been any change.

The witness *witness* then testified that he had today measured the poles at McCoy's Station, and that pole 181 is at McCoy's Station, and is 4′ 6″ from the inside edge of the rail to the nearest point to the pole that is, from the south side of the north rail to the south side of the pole 181; pole 183 is 4′ 6″; the other pole next to 183 that he did not find any number on was 4′ 6½″; pole 187 is 3′ 11″.

Q. Are these all poles on the north side of the track?
A. On the north side of the track. Pole 189 is 4′ 6¼″. Pole 191 is 4′.
Q. How about this pole at McCoy's Station?
A. Now, opposite 181 it is 6′ 6″. Opposite 183 on the south side of the track is 6′ 6¼″; opposite 187 it is 6′ 6″; opposite 189 it is 6′ 6″, and opposite 191 it is 6′ 5″.
Q. These are all poles on the south side of the line there?
A. Yes. That the poles on south side of tracks are directly opposite to poles on North side, except one.

The witness also measured poles just east of McCoy's Station; they run 6′, 4′ 7½″; another is 7′ 9″, and 8′ 9″.

Q. Now, what is the number of the nearest pole of all at that point?
A. Pole 187 is 3′ 11″ on the north side.
Q. That is the fourth pole from McCoy's Station?
A. The fourth pole, yes sir. That pole is directly—is a plumb pole—very plumb, and all the rest of them are leaning from the track.

Q. Where these few poles are that you have given that are three or four feet away is right around what; around where there is an embankment?

A. Between pole 187 to 189 is some rock embankment, in behind pole- 187 and 189.

Q. But these poles are pretty close to this embankment?

A. Yes.

Q. How close?

A. Right up to the embankment.

Q. The embankment does not come up beyond the poles?

A. No.

Q. But these poles could not be in any further without the embankment being removed, could they?

A. No.

Upon cross-examination this witness stated that he made these measurements from the level of the inside—north—rail; that there is a curve and the tendency of the curve is judged to be about 3½" or 4", maybe more; that pole 181 was the pole at McCoy's Station; that the next is pole 183, and is 4' 6" from the rail; that pole 185, being the second pole from the Station, but with no number on it, is 4' 6½"; pole 187 is 3' 11"; pole 189 4' 6½".

Q. Now, what poles were there? You said there were some poles there even four feet. What poles were they?

A. 189 and 191.

Q. I asked you about 189 and you said that was 4' 6¼".

A. 4' 6½" and 191 is 4'.

Witness does not know which pole the young man came in contact with.

Q. There is a rock formation all through there, is there, not, Mr. Gormley?

A. Yes, sir; it practically is between 187 and 189. That there is not a rock formation at pole 191; there is nothing there. It is back a good ways away from the pole. There is dirt. There isn't any rock. The rock is practically from about six feet east of 187 and then it runs about twelve or thirteen feet west of 189.

By Mr. O'Donoghue: How high is this bank here, just about 185 and 187?

A. It slopes back. The total height would be about 12 or 14 feet. I am just judging from the eye.

Q. This pole 187 that is only 3' 11" from the track. Is that perpendicular or does it slope out?

A. That is a straight pole. All the poles around this location lean from the track so the wire won't pull, and this was practically plumb. That the poles on south of tracks lean about 8 or 10 inches, and those to the North, some of them a foot, but this 187 is practically plumb.

Thereupon, and at the close of the plaintiff's case, the defendant, by its Counsel, moved the Court (the jury having been excused until the following morning), to instruct the jury to return a verdict for

the defendant upon the ground that the evidence is not sufficient to maintain the case stated by the plaintiff in her declaration, stating "as a matter of law, that a pole 30 inches away from the stanchion under the circumstances shown in this case is far enough away to relieve the company from any negligence if a man is injured walking along the running-board with reasonable care"; and stating the evidence showed that decedent was injured as the result of "assumption of risk"; and in addition to that, stated there is no evidence here to sustain any other assumption but that this man was injured as the result of losing his foothold" on the running-board. These were the only specifications made by counsel for defendant in support of his motion. The Court overruled this motion, to which action the defendant, by its counsel, then and there excepted, which exception was duly noted by the Court upon its minutes.

Thereupon the defendant, without waiving the said exception, in order to maintain the issue on its behalf, joined, offered on October 28, 1915, witnesses as follows:

JOHN J. THOMAS, who testified that he resides at 245 Eighth Street, Northeast, and is an Inspector for the Washington Railway and Electric Company and was acting as an Inspector for that Company in June, 1912, under Mr. Elliott; that he knew Alvin Joseph Scala, Conductor, and had weighed and measured him prior to his examination and employment in June, 1912. That a record was made of that, and refreshing his memory from the record, and after refreshing his memory by that record, testified that his height was 5′ 8″ and his weight 140 lbs. That Scala was required to sign and fill in a preliminary written application for employment in his own handwriting entirely which he had filled in himself. The witness identified this preliminary application which was the same paper previously identified by his father, F. W. Scala, and marked "For Identification, Defendant No. 2," and was offered in evidence to be read to the jury, to the offering of which objection was made by the plaintiff.

The Court: What is the object of it, Mr. Barbour?

Mr. Barbour: To show his age, sir.

Mr. O'Donoghue: What if they do show his age? That is not the proper way to show it anyhow.

After discussion:

The Court: If it is offered simply to prove what he said his age was at the time I will limit the admission of it to that.

Mr. O'Donoghue: He cannot read the whole paper.

The Court: There is no necessity for that.

Q. Will you read there what he stated to be his age?
A. The last birthday 21 years old.
Q. Does he give the date of his birth?
A. Date of birth March 6, 1891.

Q. I will ask you if he made a second application?
A. This is his application; yes, sir (referring to paper marked "For identification Defendant No. 1).
Q. Does he state in that the date of his birth?
A. Yes, sir; March 6, 1891. * * * Age, 21.
Q. I will ask you to look on the inside and see to whom he gave references as to that?
A. J. J. Mossburg, and I cannot make the other one out now.

* * * * * * *

The Court: What is the importance of that?
Mr. Barbour: It is signed by his father, sir.
The Witness: F. W. Scala. That is his father, apparently.
Mr. Barbour: We offer that in evidence.
Mr. O'Donoghue: That part of it?
Mr. Barbour: Yes.
Upon cross-examination this witness stated that the date the decedent was weighed was June 28, 1912.
Mr. Barbour offered in evidence these papers "on the point of his age."

Mr. JERRY HEGARTY, another witness called on behalf of the defendant, testified that his place of residence was at 1333 North Carolina Avenue; that he is Depot Clerk for the Washington Railway and Electric Company, and has been in the service of the company for 25 years; and that he keeps a record of the runs made by the different conductors and the different train crews, and had in his possession this record and from it had made a compilation of the number of hours made by Alvin Joseph Scala, as Conductor on the Cabin John branch, which compilation he produced. Witness stated that this record shows that conductor Scala made from July 23, 1912, to July 8, 1914, 94 round trips on the Cabin John Bridge line, on each of which trips he passed the point of the accident twice; he made 94 round trips; that the line over which he passed was a double track line, and on the return trip he would pass it on the opposite track; on the trip out he would go on one track and on the trip in he would go on the other track; 22 of these trips were made in the year 1912 and 72 were made in 1913; round trips; that they started in July, 1912, right in the middle of the Glen Echo season; at this time he worked extra list and did not go out there every day. He varied from day to day. "I haven't the exact record of the days here, but he went up there every day. Take August 30th: he made two trips up there. August 31, 1912, he made two trips up there on that day. September 1, he went up there two trips. September 2, three trips. September 5, two trips. September 7, one trip."
Q. All the trips he made in 1912 were in the months of July and August?
A. July, August and September. Then the park was closed, and he was not on that run any more that year. In 1913 he took a regular run #40, and went there every day, starting the first day

of June, until the day he was killed; his per diem varied a little every day; on June 1st he made 9 hours, 8 minutes, and drew $1.96; June 2d he made 9 hours, 29 minutes, and his pay was $2.04. They did not have regular pay per day but were paid by the hour. They hold them at Glen Echo according to the traffic. They may make one-half hour or an hour or an hour-and-one-half above what the schedule calls for and they pay them for their time 21¢ per hour, whatever time they make, from the time they leave the barn until they get back; in round numbers, about $2.00 per day, so that his working time averaged not quite ten hours a day. None of the men make as much as sixteen hours a day except on special occasions, like Inauguration Day, the Grand Army Encampment—just for a day. The schedule calls for ten hours.

Upon cross-examination by Mr. O'Donoghue the witness stated that on July 4th, for instance A. J. Scala made nine hours and thirty-five minutes, $2.06; and July 5th eight hours and ten minutes; that on July 5th he went to work at 11:20 and worked until 12:56; swung off from 12:56 to 5:05 and was off at 11:39 at night; he went to work at 12:20 and was off at 11:39. The next day, July 6th, he went to work at 4:51 in the evening and worked until eight minutes past one; on July 7th he went to work at 11:20; got off at 12:56; went back at 5:05; got off at 11:09. He got his regular run on the first day of June and worked ten straight days without a day off; he was off the 11th of June and was off again the 16th of June. He worked the 17th, was off on the 18th from that time until he died, but did not have any full day of 24 hours off from that time until he died.

42 Mr. HARRY VOGEL, another witness called by the defendant, testified that he lives at 214 Mass. Ave., N. W. and is employed at the New Willard Hotel and was in that employment in July, 1913, and was a passenger on the Glen Echo line on the evening of July 8th, when the conductor was injured; that he was sitting directly behind the motorman. "Just as the conductor was leaving the motorman, after talking to him, at the time he got back about the second or third seat and was going on the rear of the car for a fare it seemed as though he slipped or so. When I looked at him I just seen his body in the air. Of course some one hollered, and there was an awful noise right after his body fell as though the motorman did something to the car and made this noise overhead. We all jumped off the car, at least I fell off the car to go back where the body was, and on my way running back I noticed something white show up in the dark, and it was his body, the naked skin on his body showing. We got him off the track as quick as we could and got him on the other side and put him on the next car coming in."

Q. Did anything strike him before he slipped?

A. I didn't hear nothing. I didn't notice nothing.

The car was not going more than they generally go; about 15 or 20 miles an hour; he noticed no unusual motion about the car; he thought the body was between 10 and 15 feet from "the nearest

pole that he noticed there in the night time"; this pole was 15 or 20 feet beyond him; he got to the body before he got to the pole; and noticed no one else on the running board.

Upon cross-examination the witness stated that he was in the front seat of the car facing the motorman; not about the middle of the seat, but on the end of it. "Mr. Hardy and myself, and I think a couple of ladies were still on the farther end where we got on the car." That Mr. Hardy was just to the north of the witness; Does not think there was any other man on the car in the front seat; the car was running west, and witness was up by the motorman on the front seat, directly behind him—on the dash board. Was not on the inside of car, but was so that he could touch the motorman with his right hand. The accident happened when the conductor had gotten about two or three seats going back. There were other people in the back of the car, in the main body of the car; it was not crowded but there were quite a few on the car and there were quite a few empty seats on the car. When they picked the body up it was lying within something like ten or fifteen feet of a pole. It may have been five or ten, or ten or fifteen feet; witness did not measure it.

Q. You did not see this man fall off the car, did you?

A. I seen him leaving the car. His body was going off the car.

Q. Was that the first you saw of him?

A. After leaving the motorman he started back, and when his body was going off the car that is when I seen him.

Q. Did you hear any sound?

A. Nothing until after he went off the car."

* * * * * * *

43 I was looking toward him at the time.

* * * * * * *

The conductor attracted my attention going toward the rear of the car. * * * I was sitting there kind of noticing him going toward the rear to get a fare. * * *

I did not have to look up to see the man. I was sitting sidewise. That it was something like 3 or 4 seats from the rear.

Q. You said it seemed as though he had slipped. Could you see his feet?

A. No, sir.

Q. Then how can you say whether he slipped or not?

A. He seemed to be reaching from one bar to another one at the time.

Q. Do you call that slipping?

A. He lost his handhold, I guess.

Q. Did you see this man lose his handhold? Did you see this man loose his hand from the handle bar?

A. No, sir.

Q. Why did you just say he loosed his hand?

A. Because he was reaching from one bar to another at the time.

Q. Don't you have to have ahold with only one hand when you are reaching from one bar to another?

A. No, sir.
Q. Was he doing any more than that?
A. No, sir.
Q. Or any less than that?
—. No, sir.
Q. You say you did not notice anything unusual in him?
A. No, sir; I did not.
Q. You did not notice him slip at all, either his hand or his foot
A. I seen his body leave the car.
Q. I say you did not notice any slipping either of his hand or o
his foot?
A. No, sir.

Upon re-direct examination the witness stated further that afte
his body left the car, "The noise, I think, was from the car, th
motorman reversing or stopping the car some way or another, ther
I heard a kind of dragging under the car as though his body may
have been underneath the car. That is when we jumped from th
car and left the car and ran back. When we got back to him, as I
told you, his clothes was all torn from under him as though the run
ning board or something had caught him underneath his back."

Mr. William Francis Holmes, another witness called on behalf
of the defendant, testified that he lives at 2011 Benning Road,
Northeast, and was an electrician for the Washington Terminal
Company, and was in that employment in 1913; that he was a pas-
senger on a car of the Washington Railway and Electric Company,
Cabin John line, on July 8, and recalls the conductor being injured
on that occasion. That he was sitting in the third or fourth seat
from the front, on the right hand side of the car going out; sitting
next to the runningboard. There was no one between him and
the runningboard, and he saw the conductor when he fell from
the car, or was thrown from the car. "The conductor was standing
there taking fares from a party that was in front of me, and it
appeared to me that the conductor fell from the car as he was
putting a fare in his pocket;" at that time he did not have hold
of the car; the speed was between 15 and 18 miles an hour;
44 there was no unusual movement of the car noticeable. He
saw him fall, and saw nothing after that other than the over-
head blowing out; the thing in the roof of the car that blows out
there. Did not hear anything such as a sound of a body coming
in contact with any obstruction. "After he fell from the car some
one, a lady, if I am not mistaken, hollered that the conductor had
fallen off the car, and there was some bell given to the motorman
some signal to the motorman, and then he stopped the car.
Q. You said there was an exclamation, that some lady said some
one had fallen off the car?
A. Had fallen off the car; yes, sir.
That he did not go back; that his car stood there fifteen minutes.

Upon cross-examination the witness stated that the conductor wa
standing ahead of the seat that he was sitting in, just ahead of it.
That witness was in the third or fourth seat; the conductor was s

the second or third seat; positive he was not at the first seat. Witness was looking at him at the time and was with a young lady.

That he was watching the conductor and not the young lady at this time.

Q. Why were you watching the conductor?

A. For no reason at all that I could state other than just as he was collecting the fare from this party that was ahead of me.

It appeared to him he had both his hands in his pocket "As if to give change or putting a fare away which he had collected." Just cannot recall which hand he had in his pocket, and cannot state now which hand he had in his pocket, nor whether it was in his pants pocket or coat pocket: and did not see, and has not any idea, what he was doing with the other hand. He was standing on the running board with both of his feet on the running board "inclined to lean in" and all of a sudden he fell back and disappeared from the car. That the conductor had both of his feet on the running board, one hand in a pocket, but does not know which hand, nor which pocket, nor where the other hand was, and all of a sudden he fell of- the car: and witness was watching the conductor and not the young lady with him.

Mr. B. PEYTON WHALEN, the same witness who was originally called on behalf of the plaintiff, being called by the defendant, as a witness on behalf of defendant, and asked to again state to the jury what he saw prior to Scala's falling off or leaving the car, said:

"I thought I stated that yesterday, but I will try to state it again as I recall it. He was out on the front platform with the motorman. What his mission was there I do not know. What first attracted my attention was he started back, and he had a hold of this upright post and made an effort to come back on the running board, back to the back end of the car in that direction (indicating). As I stated yesterday, he seemed to be unable to get hold with his left hand by apparently losing his foothold on the runningboard. At that time the pole struck him. He was then away from the car a distance, and not having the proper balance it caused the pole to strike him.

That "at this stage of the game", witness "would not like to state" "which foot it was that lost the foothold or slipped"; does not recall.

Q. What was the consequence? What followed this slipping of the foot?

A. That threw him away from the car.

Q. That threw him away from the car?

A. Yes, and he swerved quite a distance from the car. As I say, that attracted my attention, but it was such short notice that before I could do anything to help him he was on top of me from the force of the pole that drove him back in the car. It was done momentarily, so suddenly that a man could hardly tell about it.

Q. He slipped and went away from the car?

A. Yes, sir.

Q. And apparently struck something and came back into the car?
A. Undoubtedly so.
Q. Was that the time you grabbed him?
A. Yes, sir.

Upon cross-examination the witness stated that at the time of this accident he was a state officer, riding on a pass the company gave him on the Rockville car line that has been a custom for many years. That he had given this pass to the conductor prior to the accident.

Q. You testified here just this morning that you had testified all you knew about this case yesterday, isn't that right?
A. As I recall it. There may have been some things that had slipped my memory.
Q. Have you talked to any one about this case since yesterday?
A. No, no more than Mr. Merscheimer had me come down.
Q. You talked with an agent of the company since you testified in this case yesterday?
A. Nothing more than he was asking me something I overlooked yesterday.
Q. When did that occur?
A. That happened this morning.
Q. Did that refresh your recollection any in this case?
A. No; the footing of the man is the thing that Mr. Merscheimer asked me about.
Q. And that refreshed your memory somewhat?
A. No, sir. I am not clear as to what his footing was.
Q. You mean to say you remember more about this case today than you did yesterday?
A. No, sir; positively not.
Q. You do not remember any more about it today than you did yesterday?
A. Nothing except what was called to my attention.
Q. Except what Mr. Merscheimer called to your attention?
A. Mr. Merscheimer wanted to know as to the footing; as to which foot this man lost.
Q. Mr. Whalen, you do not undertake to say that you are sure as to the slipping of this young man's foot or that he did slip? You are not certain what caused him to leave that car after the hold he had about which you testified yesterday?
A. I am afraid you do not understand me. I said he was away from the car farther than he normally would have been.
Q. I say you do not mean to testify this morning that this young man would have fallen from that car by reason of any slipping unless he had been struck in the rump by the pole as you testified to yesterday?
46 A. When he was struck he evidently was away from the car farther than he would have been ordinarily.

The witness stated that he knew Mr. Frederick Stohlman of Montgomery County, Maryland, and had talked to him about the case. "And I imagine he took down what I said", in shorthand.

Q. Didn't you state "he could easily, when he slipped, have regained his balance had he not been struck by the pole, and I was in a position, had he needed assistance, I would have been able to render it to him?"

A. I dare say I made that statement.

Q. That statement was made October 4, 1913, is that right?

A. I do not know the date. * * * I recall I made a statement to Mr. Stohlman, and I still state here, as I saw it, I claim the fellow would probably, undoubtedly, I think, grabbed that pole if he had not been struck.

Q. It was not the slipping that caused him to fall, but the striking of the pole?

A. The slipping caused him to be farther away from the car than he ordinarily would have been.

He further stated that Scala apparently had a firm hold on the stanchion with his right hand, and the witness was in the front seat inside the car, on the far end, and this conductor was right there at the stretch from witness's seat to dashboard and was not at the third or fourth or second seat inside the car; that he was positive about that.

Upon re-direct examination the witness further testified:

Q. Mr. Whalen, could that man have been struck by that pole if he had not slipped?

A. I would say not. On the other hand, I also think if he had been standing upright, as a man ordinarily would, on both feet, he could not have struck it.

Q. You were summoned as a witness for the plaintiff?

A. Both parties called me. It is very embarrassing to me. I have been so busy that I could not get here, but to tell you the truth, gentlemen, that is what I am here for.

Upon being further cross-examined the witness testified as follows:

Q. Mr. Whalen, you do not undertake to say if a pole is only 30 inches from the holder of a car, and the car may be rolling, that a man's rump, you call it, cannot be struck by that pole without his letting go his hold of the stanchion?

A. What attracted my attention was that he was quite a distance away from the car.

Q. I am not asking you about that, but I am asking you about your statement that the pole could not have struck him unless he was away from the car.

A. I am not familiar with the pole. I could not state.

Q. You cannot say this would not have struck him unless he was on the runningboard and holding on with both hands?

A. Why, I would say he could not.

The witness could not say how far this pole was from the car, nor the average distance, though in passing he had seen the poles; that he could not state "that man could not have been struck by this pole when on that car on that occasion without leav-

ing the car or leaving hold of the stanchion," unless the particular pole was unusually closer than the rest, and he does not know whether it was or not.

Q. You mean the average pole will not strike a man; that is what you mean, in other words?

A. That is what I mean; yes, sir.

Mr. WILLIAM EMMET WISER, another witness called on behalf of the defendant, testified that he lives at 1321½ Wisconsin Avenue; was employed as a motorman with the Washington Railway and Electric Company in July, 1913, and at the present time and his run was # 40 from Georgetown to Cabin John; that he was in charge of the car as motorman that conductor Scala was on the night he was killed; it was about 8:19 that the accident occurred; that he was running west. The conductor had been up front just about half a minute before. "He just came up and said to me; he says, "You do not run the car as fast as Mack," who was his regular motorman, a man named McNamee. He was his regular motorman. This was the first run the witness had had with him at that time. "After he left" I received one bell; that mean to stop at the next stop, and about a half a second, or a few seconds later, a lady raised up in the seat back of me and hollered that the conductor had fallen off the car. * * * I reversed my car and stopped. * * * I blew my overhead and stopped." The car was going at that time 12 to 15 miles to the best of his judgment. "I got off and taken my red light out of the back and went back and stopped the next car before it came up to where I was standing, and then I came back up to the body where I found him."

He saw Scala's body; it was lying about 12 feet east of the pole. It was in a "little cut like" and there was a little gully along in there. "We took him and carried him across the track and put him on the eastbound car for the hospital. * * * I taken my car then and went back. I taken my car to the District Line, transferred my passengers, and brought the car back to the Falls barn.

Upon cross-examination he stated the number of his car was 1625; that they were allowed to run 20 miles down there, but he was not running that fast, and that the conductor remarked that he did not run the car as fast as his other motorman. That there was nothing remarkable in that.

Q. You say when you got off the car Mr. Scala was 12 feet east of the pole. What pole?

A. From the fourth pole from McCoy's Station.

Q. What did that pole do to him?

A. Sir?

Q. I say what did that pole do to him?

A. Nothing.

Q. You say he was 12 feet east of that pole?

A. Yes, sir.

Q. Why do you mention the exact number of feet? Did you measure it?

A. Well, it was in about 12 ties from that place.
Q. The railroad ties are evenly apart, are they.
A. Very near it.

* * * * * * *

48 Q. Tell me why you did not measure the distance or estimate the distance from that pole to the other side of him? Why did you pick out the fourth pole from McCoy's Station?
A. Where I have to make a report there I make the report where I find him at, so I could put it exactly.
Q. You put that in your report?
A. Yes, sir.
Q. You picked out the fourth pole from McCoy's Station?
A. Yes, sir.
Q. Do you know the distance that pole is? You did not measure the distance that pole is from the track and put it in your report?
A. No, sir; I did not.
Q. You never noticed that pole, did you?
A. No, sir, I never did.
Q. You never knew anything of it before this time?
A. I have saw it many a time.

* * * * * * *

Q. Was there anything to attract your attention to that pole more than any other pole?
A. No, sir.
Q. How far is McCoy's Station from Georgetown?
A. Well, I guess about a mile, or probably a little more, but about a mile, I guess." That it takes about five minutes to run it from Georgetown.

On redirect examination witness stated he had made that run out there "right often."

Mr. Cleon L. Keiser, another witness produced on behalf of the defendant testified that he is an inspector in the employe of the Washington Railway and Electric Company, and was in such employment in July, 1913, on its Glen Echo Line, and that on the night of July 8th of that year he was stationed at the District Line, and after the accident took the car on which Scala had been conductor from the District Line to the barn. The hour was 8:40 or 8:45, something like that. After taking the car to the barn he went to 36th Street and then went back to the scene of the accident to find his things. That he picked up his badge, his change carrier and cap at different places and marked the ties where he picked them up and told Mr. Hunter—he was with him—and Mr. Hunter made memoranda as to the distances.

Upon cross-examination he stated that he could not off-hand state just where the change carrier was found, but that he told Mr. Hunter at the time and it was found near the scene of the accident and it had quite a lot of change in it, nickels, dimes and quarters; all the change

that a conductor would need; that he turned it into the office. The witness did not know whether the conductors purchase these change carriers or they are supplied them by the company.

On redirect examination, the witness identified on a photograph the poles between which he picked up these things. The photograph was introduced in evidence and is marked Exhibit "X" for identification. "It was between this pole (indicating) by the side of this bank (indicating). I recall it was right by this bank. Beyond this next pole the ground falls away and here (indicating) is the
49 bank right along in here. Most of the blood was along in here. I think about 12 ties.

Q. That is the pole beyond the pole on this picture which is marked 187?

A. That is very nearly up to pole 189 where he was lying.

That he does not think any of the poles were numbered at that time.

Q. Those things were between pole 187 and this next one, which you think is 189?

A. Yes, sir.

Q. 189 is farther out than 187?

A. Yes, sir. West of 187.

Mr. B. F. HUNTER, another witness introduced on behalf of the defendant, testified that he is a Clerk in the employ of the Washington Railway and Electric Company and was in that employment in July, 1913. He recalls the evning that Scala was killed out on the Cabin John Line; that he went there with Mr. Keiser; went out to find some points and to locate them; that he was not with Mr. Keiser when the latter found the cap, etc., but that Mr. Keiser pointed out to him the places where he found these things and he made memoranda at the time of these locations. That Mr. Keiser told him that the cap was picked up 16 ties east of the pole, which is 4 poles west of McCoy's Station, and the badge was found 17 ties east of that pole. The witness made no record of the point where the change carrier was found.

Upon cross-examination the witness stated that he designated the fourth pole west of McCoy's Station by counting the pole that is practically at the end or near the end of McCoy's Station; more to the west than to the east, as one pole.

By Mr. O'Donoghue: That pole is numbered ±181 isn't it?

A. I could not say as to that.

Q. It is. The testimony here is undisputed that it is numbered 181, and next comes pole 183; and that is what you call the second pole?

A. 183 is west of the station.

Q. 181 is to the west part of the station. I want to know how you began your count.

A. There is a pole practically at the station, as I recall, and I counted that one pole.

Q. If you counted that one pole that is numbered 181, then 183 we will call the second pole. Is 183 the next pole?

A. Yes; that is the second pole.

Mr. Barbour: The poles were not numbered at that time.

By Mr. O'Donoghue: 185 would be the third pole?
A. If that is the way the numbers run. I couldn't say.
Q. And 187 would be the fourth pole?
A. Yes, sir.
Q. So you made these measurements all to the east of pole 187; is that right?
Mr. Barbour: No.
Mr. O'Donoghue: Just a moment; I want to ask this witness.
The Witness: I do not quite understand what you mean.
Mr. Donoghue: I want to know what you mean by the fourth pole west of McCoy's Station.
A. It is measured off 4 poles west of the station, counting the pole which is practically, as I recall it, at McCoy's Station.

Witness stated that if the pole at the station was No. 181, that was one pole and then 187 was the fourth pole, and Mr. Kesler pointed ot to witness to make these measurements to the east of the fourth pole.

On redirect examination, witness stated he measured these points to the east of fourth pole, and they are so entered on the memorandum.

Mr. HERBERT S. GORMLEY, previously sworn *on* as a witness — behalf of the plaintiff, and now called as a wtiness on behalf of the defendant, testified that he made a sketch showing the location of these poles to the west of McCoy's Station, and identified the sketch so made (Exhibit A). That the locations and distances are indicated on this sketch.

The Witness: "The first pole shown here is in the platform at McCoy's Station. There is no distance given on the sketch." These poles were not numbered at the time. The measurements from which the sketch is drawn were made July 9, 1913, the day after the accident, and the poles were not numbered at that time. The present number assigned the pole at McCoy's Station is 181. That pole is really in the platform at McCoy's Station; the next pole west is 4′ 8″ from the gauge line of the north rail to the south side of the pole. The next pole 4′ 6″; the next one 4′ 4″; the next one 3′ 11″; that is the last measurement shown on this sketch.

Q. What pole is that?
A. It is marked 189.
Q. Have you indicated since on that plat the numbers which have been assigned to them?
A. Some one has already done it.
Q. Are they correct?
A. Yes, sir.
Q. You went there the next day, I understand?
A. Yes, sir.

Q. Was there anything on any of these poles to indicate whether or not there had been anything that had come in contact with them?

A. I noticed a rubbed place on a pole.

Q. Which pole was that?

A. (Referring to book.) It was on the pole for which the measurement was given as 4 feet 4 inches from the rail.

Q. What is the number of the pole now?

A. 187.

Q. Did you make a memorandum of that at the time?

A. I just quoted from the memorandum made on that day.

Q. Will you state to the jury just what the appearance of that rubbed place was that you spoke of?

A. It looked like just a rub. I believe they are chestnut poles, and the outer surface was more or less decayed, and in rubbing it you naturally would rub a little bit of the wood off.

Q. Were these measurements accurate at the time?

A. To the best of my knowledge they were.

Q. Have you made any measurements since then?

A. No, sir.

Q. I hand you a photograph and ask you if you know anything about it.

A. That is an enlargement from a photograph which I
51 made; and made the photograph the same day as the measurements. Marked defendant's exhibit Y and made a part hereof. He also identified the original from which he said the enlargement was made. The witness stated that he could identify the pole that was prominent in that picture from marks on the pole such as knot-holes and knots, and a photograph made October 18, 1915 (Exhibit X) which shows pole 187 prominently was shown to the witness; he identified the pole so marked as the same pole which is shown in his enlarged photograph. That the last measurements he made of the poles were in 1913. That this pole has a slight rake and lean out of the perpendicular and away from the track.

Upon cross-examination this witness stated that when he measured the poles there were no numbers on them.

Q. Counting the pole to the west part of McCoy's Station as one, and giving that your measurement of 4' 6"—I just want to get you right. I am certain I am right and I do not want you to misunderstand either, because I have measured them myself.

A. (Interposing.) My record is of the first pole after you leave the platform at McCoy's Station.

Q. That is to the west of that one?

A. 4 feet 8 inches.

Q. If that pole is 181——

A. (Interposing.) It is 183.

Q. How is that?

A. It should be 183.

Witness stated that the fourth pole from McCoy's station, not counting the pole at the platform, is 3 ft. 11 in. from the track; but

the pole which is indicated as 187 is 4′ 4″, although it was not numbered at the time he made these measurements.

Upon re-cross-examination in response to question "Q. You mean to say that pole 187 now is the fourth pole beyond McCoy's Station, not including the one at McCoy's Station?" the witness said: "I think I said if the pole at the station in the platform is 181, and counting that as one pole, counting it as #1.

Q. Where is #187?

A. 187 would be the fourth pole from that; in other words three other poles.

The Court stated that it depended entirely upon whether the pole at McCoy's Station was included whether No. 187 was the fourth pole.

On re-direct, the witness stated that he was drawing on blackboard sketch from drawing he had made; which drawing or diagram was here introduced in evidence by defendant, Exhibit A and made a part hereof. That none of the poles have been changed since this accident occurred to his knowledge. "I won't say about the same distance, because they are working on the track and they are bound to vary a little bit. In ballasting or realigning the track it may change," but the poles are the same, and the distances are practically the same.

Q. I want to ask you again if you do not want to amend your dimensions there and move them back each one pole. May you not be mistaken about that?

A. My records show this pole (indicating) is 181. As I said before, there were no numbers on them.

Q. Is not the distance of 181 4′ 8″; the one 183 4′ 6″; 185 4′ 4″; 187 3′ 11″?

A. My records do not show that.

Counsel for defendant state: "So far as I know we have not changed pole 187."

Mr. George G. Whitney, another witness called on behalf of the defendant, being first duly sworn, stated he resides at 1217 B St., N. E., and is Chief Clerk of the Washington Railway and Electric Company, and is familiar with the lines upon which the company does a freight business, and on what lines it does not; and that the Washington Railway and Electric Company is not engaged in hauling freight for the public on the Glen Echo or Cabin John Bridge line, and does not publish tariffs with the Interstate Commerce Commission or hold itself out to do any such business to his knowledge, and that he would have knowledge of it if they did it.

Upon cross-examination the witness testified in response to questions as follows:

Q. You say it does not haul anything but passengers on that line? It does not haul supplies for people up there at times?

A. I couldn't say it does not haul any freight, but it does not haul any for the public.

Q. But it does haul things up there for people living on that car line on its cars?

A. People living on the line: no, sir.

Q. For anybody up there?

A. Not for the public.

Q. What is that?

A. It doesn't haul any freight for the public.

Q. Who does it haul it for?

A. It hauls freight for the Glen Echo Park Company.

Q. The Glen Echo Park Company?

A. Yes, sir.

On redirect examination:

Q. Does the company receive any compensation for that service?

A. It does not.

On recross-examination:

Q. It receives all the fares of people going to Glen Echo Park does it not?

A. Of course that is true. The railroad Company gets the fares.

Q. In consideration of that it does not make make any special charge for the freight hauled up there; is that right?

A. I would not say.

Q. You would not say, but it is a fact, is it not?

A. No, sir.

Q. They own that right of way up there, the whole line, don't they?

A. I think so.

Mr. Le Grand Johnson, another witness called on behalf of the defendant, testified that he is in the employ of the Washington Railway and Electric Company, and has been for eight years, as an Engineer; that he went to the scene of young Scala's death on April 15, 1915, and made certain clearance measurements; that is, the distance between the gauge line of the track and certain poles in that vicinity. He measured poles 185, 187, 189 and 191.

53 and so on down the track; that pole 181 is in McCoy's Station; it is in the platform. It is on the extreme outer edge of the fill platform and the fill platform is about six feet wide; that would make that pole, the way it faced, about 5 feet from the gauge line of the track; the next pole he measured was 185, which measured from a point 4 feet above the rail and perpendicular to the plane, the top of the two rails, was four feet six and one-half inches. That he did not measure the distance at the level of the rail. Pole 187 was 4 feet even on that day, and he measured it today and it was 4 feet and ¼ inches from the track. It measured 4 feet even on April 15th and 4 feet ¼ inches today measured four feet above the track; that Mr. Edwards, from the surface department of the District of Columbia, was with him when he measured it this morning; that he did not measure the rake of that pole, but it is from one-half to three-quarters of an inch to the foot; "I should say

from a half to three-quarters of an inch to the foot." That the number of the car on which young Scala was conductor at the time he met with the accident was 1625; that he took this car to the scene of the accident and put it opposite pole 187 and made measurements on the ground.

Q. What was the result of those measurements?

A. The clearance—the distance between the outer edge of the running-board, that is, the board upon which the man walked, and the nearest point of the pole 187 was 19⅜ inches, outside of the running-board to the nearest point on the pole. The distance between the edge of the stanchion, that is, the upright piece of the car, is 25⅝ inches directly beneath the grab handle.

Q. That measures 25⅜ inches?

A. 25⅜ inches. The distance from the face of the grab handle to the nearest point of the pole directly above this pole on the grab handle here was 25½ inches. I measured it at a point two feet higher than that and it was 25⅞ inches.

Witness produced a model of the pole and the car, which he stated was made by a carpenter named Arthurs, who was with witness, and who took these measurements and called them off to witness that they took these measurements together for the purpose of making the model, so that the model "is an illustration with the exact conditions with the car at rest opposite that pole" 187.

Witness stood on the running-board of model and with a ruler measured the model and stated: "This piece here represents the running-board, which on that car was 8⅝ inches wide; this I call the stanchion; this is the grab handle; this is a little brass brace right on the outer edge of the seat; the seat runs across from here out; this is the flooring; the frame work represents the pole—pole 187." That the ruler measured the diameter of the pole on the model as being 19¼ inches; the measurement taken on the pole is 19⅜ inches, one-eighth of an inch narrower than the pole. This measurement was four feet above the ground; that from a point underneath the grabhandle of model the distance to pole of model was 28¾ inches. My measurement was 25⅜, or about there. It is now 28¾, a difference of one-eighth of an inch. The next one is 25⅞ inches, two feet above this point at this socket. The distance now is 25⅞, just what was it measured.

Witness was handed a photograph, which was exhibited to the jury, and testified it represents pole 187 and that the man in the photograph standing on track was witness, with a rule in his hand extending from the rail across to pole that that distance as measured at that time was four feet; that this photograph was taken Oct. 18, 1915; that to witness's knowledge none of these poles had been changed during time he has been in employ of defendant, seven or eight years, and that he would be likely to know if they had been changed. Marked "Defendent's Exhibit Z." and made a part hereof.

Q. Mr. Gormley testified here to some measurements made in

October or July, 1913, showing a difference of approximately four or five inches. Can you account for that difference in any way?

A. Yes, by realignment of tracks, by reballasting or by elevation of rails, or there might be a settling in it.

Q. That would not disturb the pole but would merely disturb the rails.

A. Disturb the rails only; yes, sir.

Mr. Barbour: "If your Honor please, we offer the model, approximate model, for the purposes of illustration. We also offer in evidence the photograph.

Another photograph which was exhibited to him witness identified as an enlargement from a negative given him by Mr. Gormley marked "Defendant's Exhibit W," and made a part hereof.

On cross-examination, witness testified in answer to question whether he "undertook to say that as a possible explanation of the difference between four feet six and three feet eleven at pole 187 is, as a matter of fact, to be accounted for by the change of gauge and the rail up there, or the line, but that it may have been a mistake on the part of Mr. Herbert Gormley, may it not, in measuring the number of poles?"—"I did not say there was any such change."

That there was no actual change in the gauge of this line: "It would be merely on the part of the foreman in aligning the track he might change it a little bit;" that to straighten out a little kink in it he might possibly take a track and change it six inches in and out again; "Q. I mean if you take the measurements all along there, there is one among several poles, the measurement of which differs between two people testifying, and that difference amounts to 6 or 7 inches. You don't mean to say that you can run the track in there and run it out again?

A. No, sir. That alignment and the gauge of that track has not been changed so far as witness knew.

When asked: "Q. So that the most probable explanation of Mr. Herbert Gormley's error is that he just got the poles out too far west at each time?", he replied "A. I couldn't say what it was."

That on April 15, 1915, pole 187, four feet above the track, was just four feet distant from the gauge line of the track; that
55 the "*guage* line" is "the inner edge of the rail"; and that rail is about 2½ inches wide.

That on the 28th of October, 1915, today, the distance between pole 187 to gauge line of rail, four feet above track, is four feet and one-quarter of an inch; that somehow there has been a change of one-quarter of an inch; that he this morning measured the distance from the gauge line of the rail to post 187 at the level of the rail, and it is three feet eleven inches.

That the distance from pole 187 to the stanchion is 28⅝ inches, and the distance to the handle bar is 25½ inches just above the socket with the car standing still.

On redirect examination, witness stated that pole 187 has been located there since he has been familiar with the line, 7 or eight years; that no other conductor or motorman or passenger ever came in contact with it to his knowledge. That he is the man who is generally called upon for "making measurements and diagrams" when accidents occur, and that he would know if any such thing had occurred at this point.

On recross-examination, he testified that he does not know Mr. Fishback and Mr. Smallwood, and does not know if they were struck by poles on that line, and that he did not make measurements in their cases.

Mr. JOHN EDWARDS, another witness produced on behalf of the defendant, stated that he was by profession a Civil Engineer in the employ of the Engineer of Highways of the District, and that he went out on the line of the Washington Railway and Electric Company this morning near McCoy's Station and measured pole 187 and the distance of that pole from the track, and that the distance from the gauge line on the outside rail to the pole is 3′ 11″, measured right on the level with the top of the rail. That on account of there being a curve one rail is a little higher than the other rail. The pole has a slight batter to it, probably about half an inch to the foot; that the "batter" is the slope that is set at, the offset from the vertical line, and that it leans away from the track so that the slope is about one-half inch to a foot and the distance 4 feet up he measured with a plumb line and also had an arrangement by which he could get a right-angle at that point, such as the position a car would assume when it passed over there. The distance vertically, measured by the plumb line, that is, right across the gauge line, was four feet and thirteen-sixteenths clearance; that is the rule passed through there giving that clearance—4 13/16. When the other arrangement was put in so that the perpendicular was gotten from there, the angle from there being 90 degrees, taking up for super-elevation of the rail, the clearance was found to be just a little less, which was four feet and one-quarter inches, and this measurement I got this morning.

Q. So that the four feet and one-quarter inch would give them the benefit of the fact that the car would be a little out of plumb when it was passing that point?

56 A. Yes, sir, a little out of plumb, allowing for the tilt of the car, because the rail further away from it was a little higher than the rail nearer the pole.

The witness on cross-examination stated that he did not measure the elevation of the south track above the elevation of the north track and the outer rail; the south rail, is higher than the north rail, and the distance measured was from the north rail to pole 187 "allowing for the two combinations." That he could not approximate how much, owing to difference in height of two rails, that would cause the car to lean over going around that curve. That

the clearance distance from the gauge line, inside of rail, to south face of pole 187 was 3 feet 11 inches.

Defendant's Exhibits photographs marked respectively "T." "U" and "V" were exhibited to, and examined by the jury; and are hereby made a part of this Bill of Exceptions.

And this being all the evidence, thereupon (the jury having been excused at the close of the testimony until the following morning), the defendant renewed its motion to have the Court instruct the jury to return a verdict in favor of the defendant, which motion the Court overruled. To which action of the Court in overruling said motion the defendant excepted, which exception was noted by the Court upon its minutes.

And thereupon the plaintiff, by her attorneys, tendered to the Court her eight Prayers, numbered "No. 1" to "No. 8" inclusive.

And thereupon the defendant, by its attorney, tendered to the Court its thirteen Prayers, numbered "I" to "V" inclusive, "V-a," and "VI" to "XII" inclusive.

Plaintiff's said eight Prayers, and Defendant's said thirteen Prayers are, respectively, as follows:

(NOTE.—In the reproduction of these Prayers here in this Bill of Exceptions, words in said Prayers printed in italics and stricken out thus [*like this.*]* were in said Prayers as originally tendered to the Court, but were finally stricken out due to objections of opposing counsel or by the Court of its own initiative, and were not in the Prayers as finally granted by the Court and read to the jury. Words printed in capital letters thus: LIKE THIS, were inserted to meet objections of opposing counsel, or by the Court of its own initiative, and were in the Prayers as finally granted by the Court and read to the jury.)

Plaintiff's Prayers.

No. 1.

The jury are instructed that the plaintiff is not required to prove her case beyond all reasonable doubt, but only a [fair]* preponderance of the evidence.

Granted.

57

No. 2.

The jury are instructed that, if they find from the evidence that the pole supporting the trolley wire of the defendant company was so near the running-board and stanchions of the car in passing said pole that the conductor, while in the exercise of all due care, was knocked from said running-board by said pole and thereby injured and died, they are justified in finding that the injuries and death

[* Words enclosed in brackets in red ink and erased in copy.]

of the conductor were due to the negligence of the defendant company.

Withdrawn.

No. 3.

You are instructed that the law imposes upon every employer the duty of providing a place reasonably safe and secure in which employes may carry on and perform their respective duties; and if you find from the evidence in this case that the defendant railway company located and placed its pole dangerously close to its tracks and passing cars, and further find that the conductor was injured thereby and died, when in the performance of his duty, without fault or negligence on his part, then your verdict should be for the plaintiff, unless such danger from the location of said pole, if any, was so obvious that an ordinarily prudent person under the circumstances would have appreciated it.

Withdrawn.

No. 4.

The jury are instructed that, if they find from the evidence that the defendant company was guilty of negligence, and the deceased was guilty of contributory negligence, the Act of Congress under which this suit was brought provides that such contributory negligence is not to defeat the plaintiff's right to a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the deceased. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the deceased is not a bar to plaintiff's right to recover in this suit, but it goes by way of diminution of damages in proportion to his negligence, as compared with the combined negligence of the deceased and the defendant. In other words, if the jury find that the defendant was guilty of negligence in this case, and that the deceased was guilty of contributory negligence, the plaintiff has a right to recover damages, but from these damages the jury should exclude in its verdict a proportional part of the damages corresponding to the deceased's contribution to the total negligence. The jury are also instructed that the burden of proving the contributory negligence of the deceased is on the defendant, and that before the jury are justified in diminishing the damages on account of contributory negligence of deceased, they must first find that the contributory negligence of deceased is established by a preponderance of the evidence.

Granted.

58

No. 5.

On the question of assumption of risk, the jury are instructed that there can be no recovery in this case if the deceased assumed the risk of injury. Assumption of risk is not the same as contributory negligence. Contributory negligence involves the notion of some fault or breach of duty on the part of the employe. On the other hand, the

assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. And, in this case, you are instructed that the deceased only assumed such dangers as were normally and necessarily incident to his occupation; but that he did not assume risks of another sort, not naturally incident to his occupation and arising out of any failure of the defendant company to exercise due care with respect to placing the trolley pole a safe distance from the running-board of the car. Risks of this sort, arising out of any negligence of the defendant, the jury would not be justified in finding were assumed by the deceased, unless they find first that any negligence of the defendant in placing that particular pole the distance it was from the running board, and also the risk of danger therefrom to a person passing while on that running board, under the circumstances of this case, were both alike known to the deceased, or were both so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

Granted.

No. 6.

The jury are instructed that, if they find in favor of the plaintiff, then in assessing the amount of damages for the benefit of the mother and father, they may assess these damages both on account of any conscious pain and suffering and agony of their son from the time of the injury to the time of his death and also for any loss and damage resulting to them financially by reason of the wrongful death of their son. In other words, the plaintiff, if you find in her favor, is entitled to have the damages for the benefit of the mother and father assessed by you on account of two claims which are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, the son, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, his mother and father, and is confined to their pecuniary loss through his death. One begins where the other ends. You cannot, however, assess the total amount of damages for both claims to exceed the sum of $20,000; and you need not, if you find a verdict for the plaintiff, render a separate verdict for each of the two claims, but one amount, not exceeding $20,000, to embrace the amounts found by you for both claims.

Granted.

No. 7.

The jury are instructed that, if they find in favor of the plaintiff, then in assessing the damages for the benefit of the mother
59 and father resulting to them financially by reason of the wrongful death of their son, (which damages are separate from any damages you may find for the son's pain and suffering before he died), you are entitled to take into consideration the relationship between them of parents and son, as a proper circumstance for consideration in computing these damages, which are not dependent upon any legal liability of the son to support his parents. The jury

may also take into consideration any testimony concerning the personal qualities of the son and the interest he took in his mother and father, and any testimony concerning the care, attention, consideration, maintenance and support, which he reasonably might have been expected to give to his parents, [*and*]* BUT to include the pecuniary value of all these in the damages. In other words, the jury are entitled to take into consideration in assessing the damages on this claim, which is separate from the claim for the son's suffering and pain before he dies, only such losses as the jury may find result to the mother and father because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of their son, and the fact that the son was not legally liable at the time of his death, and would not have been legally liable after he attained his majority to support his mother and father, cannot defeat their claim for damages.

Granted.

No. 8.

The jury are instructed that, if they find in favor of the plaintiff, then in assessing the damages for the benefit of the mother and father for the son's personal loss and suffering before he died, which are separate from any damages they may find resulting to them financially by reason of the death of their son, you are entitled to take into consideration any testimony in the case concerning any conscious pain and suffering endured by the son in the period between injury and death. In other words, if the jury find in favor of the plaintiff, then, in addition to any damages for pecuniary loss to the parents, the plaintiff is entitled to recover damages for the benefit of the mother and father for any conscious pain and agony which the jury may find their son endured in the period between his injury and death; and, in computing those damages for the benefit of the mother and father on account of any suffering of the son, those damages are to be measured by the jury not by the suffering of the mother and father in contemplating or grieving over any pain their son may have suffered, but those damages are to be measured by the jury from the view point of the son; that is to say, the jury may compute such damages as will be reasonably compensatory to the son for his conscious pain and agony which the jury may find he suffered in the period between injury and death, and the fact that that period may have been brief does not, of itself, defeat the claim for damages on account of the son's conscious sufferings.

Granted.

60 *Defendant's Prayers.*

I.

The jury is directed to return a verdict for the defendant.

Refused.

[* Words enclosed in brackets in red ink and erased in copy.]

II.

The Court instructs the jury that where an occurrence takes place, the real cause of which cannot be [*traced with reasonable certainty to the*]* PROVEN BY A PREPONDERANCE OF THE EVIDENCE AS BEING DUE TO THE negligence of the defendant, [*or at least is not apparent*]* it ordinarily belongs to that class of cases designated as accidental; and if the jury believe from the evidence that the injury to the plaintiff's decedent in this case was accidental, AND NOT CAUSED BY THE NEGLIGENCE OF THE DEFENDANT, then there can be no recovery and their verdict should be for the defendant.

Granted.

III.

If the jury believe from the evidence that the plaintiff received his injuries in any other way or from any other cause than stated in the declaration, their verdict should be for the defendant.

Granted.

IV.

The Court instructs the jury that some employments are necessarily fraught with danger to the workmen engaged therein, and that such dangers as are ordinarily incident to the employment as it is actually and ordinarily conducted and are obvious to a man exercising ordinary care for his own safety, are presumed to be assumed by the employee; whether he was actually aware of them or not; and even as to dangers and risks not necessarily incident to the occupation but which may arise out of a failure of the employer to exercise due care with respect to providing a safe place of work and which are obvious to ordinary observation, an employe, as soon as he becomes familiar with his place of work and the conditions surrounding the same, without objection, is likewise presumed to have assumed.

Refused.

V.

The Court instructs the jury that the defendant company was not an insurer of the safety of the plaintiff's decedent, its employe, nor an insurer of the safety of the place in which he had to work. Its only duty was to exercise reasonable care to furnish him a reasonably safe place in which to work, and this did not mean a place which was free of all danger.

Granted.

61 V-*a*.

The Court instructs the jury that the defendant can only be held liable to the plaintiff in this action for damages legally proven by a

[* Words enclosed in brackets in red ink and erased in copy.]

preponderance of the evidence to have resulted directly and proximately from the particular negligent act or omission of the defendant stated in the declaration. The fact of the act or omission and its negligent character, as well as the fact of injury resulting proximately therefrom, must each be established by a preponderance of the evidence [*and with reasonable certainty.*]* In order to find that a given act is negligent and is the proximate cause of an injury, it is essential for the jury [*to be convinced*]* Find by a preponderance of the evidence that a man exercising reasonable care should have foreseen that injury would result to his employes properly discharging their duty, as the usual result of such act or omission.

Granted.

VI.

The court instructs the jury that the mere occurrence of the accident to and resultant death of the plaintiff's decedent does not constitute even prima facie evidence of negligence on the part of the defendant.

Granted.

VII.

The court instructs the jury that there was no duty on the defendant company to anticipate a negligent or unusual manner of performing his duty on the part of the servant, or to render the servant safe from injuries resulting from his negligent method of performing his duty or from unforeseen accidents or occurrences.

Refused.

VIII.

The court instructs the jury that it is not necessary for them to find the plaintiff guilty of negligence in order to properly return a verdict for the defendant. If the evidence fails to show [*culpable*]* negligence on the part of the defendant in the particulars stated in the declaration, the jury should return a verdict for the defendant without further inquiry or question as to whether the plaintiff was or was not guilty of negligence.

Granted.

IX.

The court instructs the jury that even though they believe from the evidence that the defendant was negligent in placing its trolley poles in dangerous proximity to its tracks, yet, if the jury further believe from the evidence that the location of the said trolley poles was known to the plaintiff's decedent, or that he had been working as a conductor on the cars of the defendant company passing
62 those trolley poles at frequent intervals for several months, and that the poles had been located at the same place for many years prior to the accident and that the decedent had failed

[* Words enclosed in brackets in red ink and erased in copy.]

to make complaint or objection on account of the location of said trolley poles, then he assumed the risk of danger from their location, if there was any danger in it, and the jury should return their verdict for the defendant.

Refused.

X.

Even though the jury may believe from the evidence that the plaintiff is entitled to a recovery as the result of negligence on the part of the defendant, still the jury has no right to allow the plaintiff speculative, imaginative or conjectural damages, or any damages which are not fairly and satisfactorily established by a preponderance of the evidence, to be justly compensatory for pecuniary injuries actually inflicted on and suffered by the next of kin of the decedent as a direct and proximate result of the decedent's death.

Refused.

XI.

The jury is instructed that their verdict should be based solely upon the evidence, without regard to the parties; it would be a violation of their oaths as jurors to be influenced by or to consider to any extent the fact that the plaintiff is an individual or that the defendant is a corporation. It is the duty of the jury to permit neither sympathy nor prejudice for or against either of the parties to have any influence on their verdict, which must be based solely upon the preponderance of the evidence and upon the law as stated by the court.

Granted.

XII.

The court instructs the jury that if in weighing the evidence it should be so equal that a doubt is in their minds as to whether they should give a verdict for the defendant or for the plaintiff on account of the weight of the evidence, then it is their duty to give a verdict in favor of the defendant, because the plaintiff has not overcome the evidence of the defendant by a preponderance. The plaintiff's evidence must outbalance the evidence of the other side. Always, before returning a verdict in favor of the plaintiff, you must be convinced that the plaintiff is correct.

Refused.

And thereupon the Court proceeded to pass upon the tendered Prayers; and granted plaintiff's Prayer No. 1, no objection having been made thereto by defendant; and rejected plaintiff's Prayer No. 2, defendant having objected thereto; and granted plaintiff's Prayers No. 3, No. 4 and No. 5, over the objections of defendant thereto.

And thereupon the Court proceeded to consider Plaintiff's Prayer No. 6, and defendant objected thereto on the ground, among
63 others, that, under the authority of the case of Michigan Cent. R. R. Co. vs. Vreeland, 227 U. S. 59, there could be no re-

covery under the Employers' Liability Act of 1908 and Amendment of 1910 for the conscious pain and suffering of decedent before his death for the benefit of the beneficiaries, but that recovery was limited to the pecuniary loss of the beneficiaries by reason of his death.

And thereupon the Court announced that it would defer its decision as to the Prayers until the following morning, at which time it would pass upon all the Prayers in the case; and adjourned Court until the following morning.

At the opening of Court, the morning of October 29, 1915, the jury having been excused pending decision as to Prayers, the counsel for plaintiff withdrew plaintiff's Prayers No. 2 and No. 3, and tendered to the Court as a substitute therefor plaintiff's Prayer No. 3-A; and thereupon counsel for defendant tendered to the Court an additional prayer for defendant, namely "III-*a*"; said Plaintiff's Prayer No. 3-A, and Defendant's Prayer III-*a*, being as follows:

Plaintiff's Prayer No. 3-*a*.

The jury are instructed that the law imposes upon every employer the duty of EXERCISING REASONABLE CARE IN providing a place reasonably safe and secure in which employees may carry on and perform their respective duties; and that if the jury find from the evidence in this case that the defendant company located and placed the pole, to-wit, No. 187, supporting the trolley wire of the defendant company, dangerously close to its tracks and passing cars, and further find that the deceased conductor was knocked from the running board of the car by the said pole and thereby injured and killed, then their verdict should be for the plaintiff, unless such danger from the location of said pole, if any, was so obvious that an ordinarily prudent person under the circumstances would have appreciated it.

Granted.

Defendant's Prayer III-*a*.

If the jury believe from the evidence that the plaintiff's decedent received his injury by reason of failure to grasp one of the stanchions or losing his footing as he passed along the running board, thereby protruding his body further than usual beyond the outside line of the car and thus causing his body to come in contact with a trolley pole their verdict should be for defendant.

Refused.

And thereupon the Court proceeded to pass upon whether or not the plaintiff could recover in this case both for the pecuniary loss to the mother and father by reason of their son's death, and also for the conscious pain and suffering of the son, if any, in the period of time between the accident and his death; and held that plaintiff could recover for both said claims in this case.

64 And the Court further certifies that during the discussion of said question, and after the court had stated to counsel for plaintiff: "I think you will have to amend before you can recover for pain and suffering"; and after all the witnesses had been discharged from further attendance, the Court granted the motion of the plaintiff for leave to amend her declaration by inserting, in the third and fourth counts after the words "resulting in the" the words "conscious pain and suffering and in the", and in the last page of the declaration in the twelfth line from the bottom after the words "resulting in the" the words "conscious pain and suffering and in the". This was done over the objection of the defendant's Counsel, upon the ground that it inserted a new cause of action and one bound by the limitation of the Statu-e giving the cause of action, who stated that he had brought no evidence nor made any preparation to present evidence on the question of physical pain and suffering, and had made no preparation on that line under his right to rely upon the pleadings; but the Court overruled said objection and permitted said amendment, to which action of the Court the defendant excepted, which exception was duly entered on record; and thereupon the defendant, by counsel, asked for leave to plead to the amended declaration, which leave was granted; and thereupon counsel for plaintiff orally pleaded "Not Guilty" and the Statute of Limitations of two years; and thereupon counsel for plaintiff orally demurred to the plea of the statute of limitations; and the Court sustained the demurrer and overruled the plea of the statute of limitations, to which counsel for the defendant excepted.

And thereupon Counsel for defendant moved the Court to continue the cause because the action of the Court in permitting said amendment constituted a surprise to the defendant on the element of pain and suffering, for the reasons above stated, to which the Court responded: "I will frankly say that if I had been reading that declaration from the standpoint of the defendant I would not have suspected that it was the intention to recover for the pain and suffering of this man in the hours he lived, if he lived an hour after his injuries," but overruled the said motion, and stated that the Court did not regard the right to recover for conscious pain and suffering of decedent under the Federal Employers' Liability Act and Amendment thereto as a separate cause of action, to which action of the Court in refusing to continue the case the defendant excepted, which exception was duly noted by the Court upon its minutes.

And thereupon the Court proceeded to pass upon all the Prayers in the case.

And the defendant, by its attorney, objected to the granting of each of the Prayers of the Plaintiff, but the Court granted Plaintiff's Prayers No. 1, No. 3-A, No. 4, No. 5, No. 6, No. 7 and No. 8, (Nos. 2 and 3 having been previously withdrawn), and to the granting of each of Plaintiff's Prayers, severally, the defendant excepted, which several exceptions were noted by the Court upon its minutes.

And the plaintiff, by her attorneys, objected to the grant-
65 ing of all of Defendant's Prayers except XI, but the Court granted Defendant's Prayers II, III, V, V-*a*, VI, VIII, XI, and

rejected Defendant's Prayers I, III-*a*, IV, VII, IX, X and XII; and to the action of the Court in refusing to grant Defendant's said Prayers I, III-*a*, IV, VII, IX, X and XII, the defendant, by its attorney, excepted, and said exceptions were duly noted by the Court upon its minutes.

And thereupon, the jury having come into the Court room, the Court charged the jury as follows:

The Court (Mr. Justice Gould): Gentlemen of the Jury, this suit is brought by Ann Catherine Scala, as Administratrix of the estate of Alvin Joseph Scala, deceased, against the Washington Railway and Electric Company, for damages suffered by the representatives—in this case the father and mother—of the deceased by reason of his death, and also for damages for such suffering as the deceased underwent during the time he was consciously alive.

The first two counts of the declaration have been withdrawn by the plaintiff, as I understand, so the case goes to you on the third and fourth counts, which set out a cause of action under what is known as the Employers' Liability Act, passed by Congress some years ago and subsequently amended. I will not go into the details of the act because the instructions as to the law which I will give you are formed upon the act itself.

I want to ask your careful attention to the law as I lay it down to you, because it is somewhat complicated by reason of the provisions of this act itself. In stating the law to you if there is any point that I leave obscure it will be your duty to ask me to explain it more fully, because while you are the sole judges of the facts in the case you must take the law as it is laid down to you by the Court.

You are instructed that the plaintiff is not required to prove her case beyond all reasonable doubt, but only by a preponderance of the evidence. I might explain that in a criminal case before a man can be convicted his guilt must be established beyond a reasonable doubt; in a civil case the party which establishes his case by a preponderance of the evidence prevails. A different rule applies to the two kinds of actions.

You are instructed further that the law imposes upon every employer the duty of exercising reasonable care in providing a place reasonably safe and secure in which employees may carry on and perform their respective duties; and that if the jury find from the evidence in this case that the defendant company located and placed the pole, to-wit, No. 187, supporting the trolley wire of the defendant company, dangerously close to its tracks and passing cars, and further find that the deceased conductor was knocked from the running board of the car by said pole and thereby injured and killed, then their verdict should be for the plaintiff, unless such danger
from the location of said pole, if any, was so obvious that an
66 ordinarily prudent person under the circumstances could have
appreciated it.

The jury are instructed that if they find from the evidence that the defendant company was guilty of negligence—the defendant company was guilty of negligence—and the deceased was guilty of contributory negligence, the act of Congress under which this suit

was brought provides that such contributory negligence of the intestate, the dead man, is not to defeat the plaintiff's right to a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the deceased. So, if you reach that point in your deliberations where you find it necessary to consider the defense of contributory negligence, the negligence of the deceased is not a bar to plaintiff's right to recover in this suit, but it goes by way of diminution of damages in proportion to his negligence, as compared with the combined negligence of the deceased and the defendant.

In other words, if the jury find that the defendant was guilty of negligence in this case—that is, that the railroad company was guilty of negligence in this case, and that the deceased, the dead man, was also guilty of contributory negligence, the plaintiff has a right to recover damages, but from these damages the jury should exclude in its verdict a proportional part of the damages corresponding to the deceased's contribution to the total negligence.

The jury are also instructed that the burden of proving the contributory negligence of the deceased is on the defendant, and that before the jury are justified in diminishing the damages on account of contributory negligence of the deceased, they must first find that the contributory negligence of the deceased is established by a preponderance of the evidence.

Now, that is a provision of the statute which is not only hard to state clearly, but it is hard to apply.

Mr. O'Donoghue: May I suggest an illustration?

The Court: No, I will do that. Take an abstract case. Suppose a man sues another for injuries caused by the negligence of the other. Under the general law if the defendant can show that the injuries received by the plaintiff were the result of his own negligence, contributing directly to his accident, he cannot recover at all even though the defendant may have been guilty of negligence. But under this law, as I have stated it here in this instruction, even though the plaintiff was guilty of what we call contributory negligence—that is, a failure to exercise reasonable care, which contributed directly to his accident—yet that does not bar his recovery, provided you find the defendant was guilty of negligence. But in determining the amount to be awarded him you should diminish it just as you think the plaintiff's contributory negligence was related to that of the defendant.

In other words, you deduct from the recovery what you think ought to be deducted because of the contributory negligence of the plaintiff, if any.

Mr. O'Donoghue: May I——

67 The Court: No; I shall charge the jury. After I am through if you have any exceptions you may take them.

The Court also charges you on the question of assumption of risk that the jury are instructed that there can be no recovery in this case if the deceased assumed the risk of injury. Assumption of risk is not the same as contributory negligence. Contributory negligence involves the notion of some fault or breach of duty on the

part of the employee. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employe.

And, in this case, you are instructed that the deceased only assumed such dangers as were normally and necessarily incident to his occupation; but that he did not assume risks of another sort, not naturally incident to his occupation and arising out of any failure of the defendant company to exercise due care with respect to placing the trolley pole a safe distance from the running board of the car. Risks of this sort, arising out of any negligence of the defendant, the jury would not be justified in finding were assumed by the deceased, unless they find first that any negligence of the defendant in placing that particular pole the distance it was from the running board, and also the risk of danger therefrom to a person passing while on that running board, under the circumstances of this case, were both alike known to the deceased, or were both so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

The jury are instructed that if they find in favor of the plaintiff, then in assessing the amount of damages for the benefit of the mother and father, they may assess these damages both on account of any conscious pain and suffering and agony of their son from the time of the injury to the time of his death and also for any loss and damage resulting to them financially by reason of the wrongful death of their son.

In other words, the plaintiff, if you find in her favor, is entitled to have the damages for the benefit of the mother and father assessed by you on account of two claims, which are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person, the son, and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries, his mother and father, and is confined to their pecuniary loss through his death. One begins where the other ends.

You cannot, however, assess the total amount of damages for both claims to exceed the sum of $20,000; and you need not, if you find a verdict for the plaintiff, render a separate verdict for the two claims. In other words, you can unite them. If you find for the plaintiff, whatever damages you assess may be stated in one sum.

The jury are instructed that if they find in favor of the plaintiff, then in assessing the damages for the benefit of the mother and father resulting to them financially by reason of the wrongful death of their son (which damages are separate from any damages you may find for the son's pain and suffering before he died), you are
68 entitled to take into consideration the relationship between them, of parents and son, as a proper circumstance for consideration in computing these damages, which are not dependent upon any legal liability of the son to support his parents.

The jury may also take into consideration any testimony concerning the personal qualities of the son and the interest he took in his mother and father, and any testimony concerning the care, attention, consideration, maintenance and support, which he reason-

ably might have been expected to give to his parents, but to include the pecuniary value of all these in the damages.

In other words, the jury are entitled to take into consideration in assessing the damages on this claim, which is separate from the claim for the son's suffering and pain before he died, only such losses as the jury may find result to the mother and father because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of their son, and the fact that the son was not legally liable at the time of his death, and would not have been legally liable after he attained his majority, to support his mother and father cannot defeat their claim for damages.

The jury are instructed that if they find in favor of the plaintiff, then in assessing the damages for the benefit of the mother and father for the son's personal loss and suffering before he died, which are separate from any damages they may find resulting to them financially by reason of the death of their son, you are entitled to take into consideration any testimony in the case concerning any conscious pain and suffering endured by the son in the period between injury and death.

In other words, if the jury find in favor of the plaintiff, then, in addition to any damages for pecuniary loss to the parents, the plaintiff is entitled to recover damages for the benefit of the mother and father for any conscious pain and agony which the jury may find their son endured in the period between his injury and death; and, in computing those damages for the benefit of the mother and father on account of any suffering of the son, those damages are to be measured by the jury not by the suffering of the mother and father in contemplating or grieving over any pain their son may have suffered; but those damages are to be measured by the jury from the view point of the son; that is to say, the jury may compute such damages as will be reasonably compensatory to the son for his conscious pain and agony which the jury may find he suffered in the period between injury and death, and the fact that that period may have been brief does not, of itself, defeat the claim for damages on account of the son's conscious sufferings.

The Court also instructs the jury that where an occurrence takes place, the real cause of which cannot be proven by a preponderance of the evidence as being due to the negligence of the defendant, it ordinarily belongs to that class of cases designated as accidental; and if the jury believe from the evidence that the injury to the plaintiff's decedent in this case was accidental, and not caused
69 by the negligence of the defendant, then there can be no recovery, and their verdict should be for the defendant.

If the jury believe from the evidence that the plaintiff received his injuries in any other way, or from any other cause than that stated in the declaration, their verdict should be for the defendant.

The court instructs the jury that the defendant company was not an insurer of the safety of the plaintiff's decedent, its employe, nor an insurer of the safety of the place in which he had to work. Its only duty was to exercise reasonable care to furnish him a reason-

ably safe place in which to work, and this did not mean a place which was free of all danger.

The Court instructs the jury that the defendant can only be held liable to the plaintiff in this action for damages legally proven by a preponderance of the evidence to have resulted directly and proximately from the particular negligent act or omission of the defendant stated in the declaration. The fact of the act or omission and its negligent character, as well as the fact of injury resulting proximately therefrom, must each be established by a preponderance of the evidence.

In order to find that a given act is negligent and is the proximate cause of an injury, it is essential for the jury to find by a preponderance of the evidence that a man exercising reasonable care should have foreseen that injury would result to his employees properly discharging their duty, as the usual result of such act or omission.

The Court instructs the jury that the mere occurrence of the accident to and resultant death of the plaintiff's decedent does not constitute even prima facie evidence of negligence on the part of the defendant.

The Court instructs the jury that it is not necessary for them to find the plaintiff guilty of negligence in order to properly return a verdict for the defendant.

If the evidence fails to show negligence on the part of the defendant in the particulars stated in the declaration, the jury should return a verdict for the defendant without further inquiry or question as to whether the plaintiff was or was not guilty of negligence.

The jury is instructed that their verdict should be based solely upon the evidence, without regard to the parties; it would be a violation of their oaths as jurors to be influenced by or to consider to any extent the fact that the plaintiff is an individual or that the defendant is a corporation.

It is the duty of the jury to permit neither sympathy nor prejudice for or against either of the parties to have any influence on their verdict, which must be based solely upon the preponderance of the evidence and upon the law as stated by the Court.

You may take the case.

And thereupon, and before the jury retired, and in the presence of the jury, the defendant, by its Counsel, renewed its objection, separately and severally, to the granting by the Court of the plaintiff's prayers numbered 1, 3-A, 4, 5, 6, 7, 8; and the refusal of the court to grant the defendant's prayers Nos. I, III-*a*, IV, VII,
70 IX, X, and XII, which objection being overruled by the Court, the defendant, by its Counsel, then and there noted its exception, which exception was duly noted by the Court upon its minutes.

Thereupon the jury retired and returned a verdict for the plaintiff in the sum of $7,500.00.

Be it remembered that each of the separate and several exceptions taken by Counsel for defendant to the rulings of the Court as to the exclusion and admission of evidence, and the rulings of the

Court in admitting and refusing the instructions to the jury, and the ruling of the Court in permitting said amendment, and in not continuing the case thereafter, were taken by Counsel for the defendant, then and there, before the jury retired, separately and severally, and said exceptions were then and there separately noted upon the minutes of the Justice presiding at the trial, and in order that the foregoing matters and things which would not otherwise appear of record may be made so to appear, and that it may be made known that the foregoing constitutes the substance of the evidence given in the course of the trial of this cause, counsel for the defendant prays the Court to sign this Bill of Exceptions which has been settled by agreement of Counsel for both parties, and the same is accordingly so signed and sealed by the Court and made a part of the record in this cause, this 18th day of February, 1916.

ASHLEY M. GOULD,
Associate Justice of the Supreme Court of the District of Columbia.

Endorsed on cover: District of Columbia Supreme Court. No. 2935. Washington Railway & Electric Company, appellant, vs. Ann Catherine Scala, admx., &c. Court of Appeals, District of Columbia. Filed Mar. 10, 1916. Henry W. Hodges, clerk.

71 TUESDAY, October 19th, A. D. 1916.

No. 2935.

WASHINGTON RAILWAY & ELECTRIC COMPANY, Appellant,

vs.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased.

The argument in the above entitled cause was commenced by Mr. John S. Barbour, attorney for the appellant, and was continued by Mr. D. W. O'Donoghue, attorney for the appellee, and was concluded by Mr. John S. Barbour, attorney for the appellant. On motion the appellant is allowed two days to file additional authorities herein if so advised.

No. 2935.

WASHINGTON RAILWAY & ELECTRIC COMPANY, Appellant,

v.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This appeal is from a judgment of the Supreme Court of the District of Columbia in favor of appellee, plaintiff below, in a suit to recover damages for the death of plaintiff's decedent, who was killed while in the employ of defendant company as conductor on one of its cars.

It appears that defendant operates a double track electric railway line in connection with its street railway system from the city of Washington, through the District, into the State of Maryland, to a point known as Cabin Johns Bridge. The line, after leaving the city, is constructed under a separate charter, and extends through a right of way owned by the railway company. The cars are propelled by electricity conveyed from an overhead trolley which is supported from trolley poles erected at frequent intervals along each side of the tracks.

The accident which caused the death of the decedent, plaintiff's son, occurred about 8.15 P. M. on July 8, 1913. Decedent was standing on the running board of a summer car collecting tickets, when he stooped for some purpose and while in this position his body, protruding from the car, came in contact with trolley pole number 187, knocking him from the car and inflicting the injuries from which he shortly thereafter died.

The case is here under the Employers' Liability Act of April 22, 1908 (35 Stats. L., 65), as amended by the act of April 5, 1910 (36 Stats. L., 291), which provides:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employees, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

It is contended by counsel for defendant that defendant company is not a common carrier by railroad within the terms of the Employers' Liability Act. The Washington & Great Falls Electric Railway Company was incorporated under the act of Congress of July 29, 1892 (27 Stats. L., 326). An examination of this act and the acts amendatory thereof—August 23, 1894 (28 Stats. L., 492); June 3, 1896 (29 Stats. L., 246), and June 5, 1900 (31 Stats. L., 270—disclose that the company was chartered, not as a street railway com-

pany, but as an electric trolley suburban and interurban railway company, with power to extend its line westwardly from Thirty-sixth and Prospect Streets, this city to Cabin John Creek, in Maryland. It thus extended from the western edge of the city, through small suburbs and country, possessed power of eminent domain to acquire right of way, and was required to maintain a passenger station at the point of beginning. Later, when it changed its name, a contract was made connecting its road with a street railway line extending eastwardly into and through the city.

This case is analogous to the situation disclosed in the case of Kansas City Ry. v. McAdow, 240 U. S., 51, where the railway company operated an electric trolley line between Leavenworth, Kansas, and Kansas City, Missouri, where it connected with the lines of a street railway company over whose line its cars were run from and to the terminus of its own line. A motorman was injured in Kansas, and the suit was brought under the Federal Employers' Liability Act. Judgment was recovered, and the Supreme Court, in its opinion affirming the judgment said: "The defendant's road appears to be of the class of the Traction Company that was before the court in United States v. Baltimore & Ohio Southwestern R. R., 226 U. S., 14, and that was excepted from the decision in Omaha & Council Bluffs Street Ry. v. Interstate Commerce Commission, 230 U. S., 324, 337. Such roads have been held to be within the act of Congress. Spokane & I. E. R. R. v. Campbell, 217 Fed. Rep., 518. See act of June 18, 1910, c. 309, sec. 12; 36 Stat., 539, 552."

This decision disposes of the Omaha & Council Bluffs case, the only Federal case relied upon by counsel for defendant. That case is not in point here. It involved the question of the jurisdiction of the Interstate Commerce Commission over a company operating a purely street railway line extending into and between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, along city streets through which it acquired its right of way, with privilege to operate through the cities subject to city regulations. It is, therefore, not analogous to this case.

Defendant attempts to invoke the doctrine of assumed risk. Deceased had made ninety-four trips over the road in his capacity of conductor. He would be presumed, doubtless, with this experience, to be familiar with dangerous conditions of a permanent character existing along the road. But we do not think, under the evidence, that the close proximity of the trolley pole to the track was so obvious a danger as to attract the attention of a reasonably prudent person and put him on guard against the sort of accident that befell this employee. The railroad, throughout its length, was lined with trolley poles on either side of the tracks, standing at short in-
73 tervals apart. They were not uniformly situated with relation to the tracks, but varied in distance therefrom according to the topography of the right of way. Pole 187, the testimony shows, was in closer proximity to the tracks than any other pole in that vicinity. It stood but three feet eleven inches from the inside of the near rail, and but nineteen and three-eighths inches from the outer edge of the running board of the car. At this point there was

a curve in the track which caused the car to rock toward the pole. There is testimony that it was dark, and the track at this point was not lighted. We think there was not only sufficient evidence to establish negligence on the part of defendant, but that the plea of assumed risk must fail.

There is evidence that at the moment of the accident, the car was running at from twenty to thirty miles per hour. A conductor busily engaged in transacting the company's business would not be presumed to have noticed the particular position of pole 187 in a zig-zag, irregular line of several hundred poles and be required to guard against it by night and day from a car moving at this high rate of speed.

We come now to a more difficult question. Error is assigned in the court below permitting plaintiff to amend her declaration more than two years after the accident, to include a claim for damages for the pain and suffering sustained by the decedent prior to his death as the result of the injuries received. The amendment was allowed, and defendant entered a plea to the effect that the amendment was barred by the provision of the statute limiting the time within which actions can be brought under it to two years. Plaintiff demurred to the plea, and the court sustained the demurrer. The question thus presented is, Whether or not, under the Employer's Liability Act, the right of the representative to recover damages for the pain and suffering endured by the decedent, constitutes a separate and distinct cause of action?

The fact that counsel for defendant seven days before the trial consented to the allowance of the amendment in no way waives his right to make the defense of limitations. The consent covered only the right to insert the amendment in the declaration, but did not waive defenses thereto. Union Pacific Ry. Co. v. Wyler, 158 U. S., 285.

At common law the right of action for a personal injury is extinguished by the death of the injured party. The maxim "actio personalis moritur cum persona" applies, whether the death be instantaneous or not. The original act of 1908 created no right of survival to the next of kin of the right of action belonging to an injured employee. That is, no right to recover for pain and suffering, as existed in the injured party at common law, survived by the act of 1908 to his next of kin. The sole right of recovery under the act on their behalf depended upon the death of the injured party.

The first section of the act, however, provides for two rights of action based upon the same wrongful act. The injured employee has a right of action for damages for personal loss and suffering where his injuries are not immediately fatal. His personal representative, on behalf of certain designated relatives, has also a right of action for any pecuniary loss which they may sustain by reason of his death. In other words, the act made no provision for the survival of the right which belonged to the injured employee; hence, as at common law, it died with him.

In Michigan Central R. Co. v. Vreeland, 227 U. S., 59, the court defined the scope of the original act of 1908 as follows: "The obvious

purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds, 'or in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; or, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death,' etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous. This cause of action is independent of any cause of action which the decedent had, but includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only."

The amendment of 1910, supra, however, clearly created in the relatives a survival of the right which belonged to the injured party under the original act. The scope of the act, as amended, is expressed in St. Louis & Iron Mountain Ry. v. Craft, 237 U. S., 648, 657, as follows: "No change is made in section 1. Taylor v. Taylor, 232 U. S., 363, 370. It continues, as before, to provide for two distinct rights of action: one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to injured persons 'shall survive' to his personal representative 'for the benefit of' the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly. It does not mean that the injured person's right shall survive to his personal representative and yet be unenforceable by the latter, or that the survival shall be for the benefit of the designated relatives and yet be of no avail to them. On the contrary, it means that the right existing in the injured person at his death—a right covering his loss and suffering while he lived but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life—shall survive to his personal representative to the end that it may be enforced and the proceeds paid to the relatives indicated."

The purely statutory right of the designated relatives to re-
74 cover for the pain and suffering endured by the decedent being established, we come now directly to the question of whether or not this right of recovery constitutes a separate and distinct cause of action. On this point, the court in the Craft case said: "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the

other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong."

We have, therefore, a single right of action for a double wrong. The two claims, though distinct, originate in the injury which is the basis of the right of action to recover damages on one or both claims. In other words, the right of recovery for pain and suffering is an additional claim constituting an element of damage growing out of the injury inflicted upon which the single cause of action is based. Indeed, the statute itself limits the recovery on the two claims to a single action, providing that "in such cases there shall be only one recovery for the same injury." The right to thus amend without stating a new cause of action is supported in principle by numerous decisions of this court. Neubeck v. Lynch, 37 App. D. C., 576; District of Columbia v. Frazer, 21 App. D. C., 154; Stevens v. Saunders, 34 App. D. C., 321.

Counsel for defendant lays great stress upon the case of Union Pacific Ry. Co. v. Wyler, supra, as supporting his contention. In that case the action in tort to recover damages for personal injuries was brought in the State of Missouri and the declaration stated a cause of action under the common law as applicable to such actions in that State. It was afterwards sought to amend the declaration to establish a cause of action under a statute of Kansas. The court held that this constituted a different cause of action. It was a departure from law to law. In the present case, the departure is not even from fact to fact. It in no way changes, limits or modifies the cause of action as originally stated. It merely alleges additional facts affecting the measure of damages. Such amendments, it has been held, are proper and relate in point of time back to the date of filing the original declaration.

Error is assigned in the refusal of the court to grant a continuance of the case when the amendment was made. The case was tried apparently upon the theory that the allegations of the declaration were sufficient to support a recovery for pain and suffering. The evidence on the part of both plaintiff and defendant was elicited on this theory. It was at the close of the trial that the court suggested the amendment to counsel for plaintiff. The amendment simply made the declaration conform to the evidence. Defendant can not claim surprise, as the evidence had been admitted without objection. It would have been futile to have continued the case. Defendant made no proffer of new or additional evidence to be adduced at a future hearing, and we must assume that he possessed none. The motion was addressed to the sound discretion of the trial judge, and unless it is apparent that a prejudicial error was committed, we will not attempt to control his discretion. A careful review of the record convinces us that no such error exists.

We now come to the general assignment charging error in the court's denial of a motion for an instructed verdict on the insuffi-

ciency of the evidence to establish negligence on the part of defendant. As suggested under the head of assumed risk, we have no hesitancy in holding defendant company guilty of negligence in erecting and maintaining the trolley pole in question in such close proximity to the track as to render the place unsafe for an employee engaged in the duties deceased was performing at the time of the accident. As to the sufficiency of the evidence to support the judgment for damages for pain and suffering endured by deceased, we entertain no doubt. Though decedent lived less than an hour after the happening of the accident, there is ample testimony of consciousness, and, as the court said in the Craft case, where the evidence of consciousness was not so convincing as here: "The jury found that he was conscious and both State courts accepted that solution of the dispute. Of course, the question here is not which way the evidence preponderated, but whether there was evidence from which the court reasonably could find that while he lived he endured conscious pain and suffering as a result of his injuries. That question, we are persuaded, must be answered in the affirmative. But to avoid any misapprehension it is well to observe that the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." Like all other questions of fact, this question is for the determination of the jury.

Numerous errors are assigned to the granting of plaintiff's prayers. Without considering these assignments separately, it is sufficient to state that upon a careful consideration of the prayers granted together with the able charge of the trial justice, we find no error.

The judgment is affirmed with costs. Affirmed.

75 October Term, 1916.

MONDAY, December 4th, A. D. 1916.

No. 2935.

WASHINGTON RAILWAY & ELECTRIC COMPANY, Appellant,

vs.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and ad-

judged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE VAN ORSDEL.

December 4, 1916.

76 In the Court of Appeals of the District of Columbia.

No. 2935.

WASHINGTON RAILWAY AND ELECTRIC COMPANY, a Corporation, Appellant,

vs.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased, Appellee.

Motion for Writ of Error.

Now comes the Appellant, the Washington Railway and Electric Company, a Corporation, by its Attorney, and moves the Court to grant it a writ of error to remove the above entitled cause to the Supreme Court of the United States, and to stay the mandate of this Court until the termination thereof, and also to fix a bond for costs.

In support of this motion appellant avers that it has a right to said writ by virtue of Section 250 of the Judicial Code of the United States, for the reason that this cause involves the construction of the Act of Congress of April 22, 1908 (35 Stats. L. 65), and the like Act of Congress of April 5, 1910 (36 Stats. L. 291), amendatory thereto, and known as the "Federal Employers' Liability Law," the proper construction of said Act having been drawn in question by this Appellant, the Defendant in the Court below, as is apparent from the face of the Record.

JNO. S. BARBOUR,
Attorney for Appellant.

(Endorsed:) In the Court of Appeals of the District of Columbia. No. 2935. Washington Railway and Electric Co., A Corp., Appellant, vs. Ann Catherine Scala, Adm'x Est. Alvin Jos. Scala, Dec'd, Appellee. Motion for Writ of Error, Stay of Mandate, Bond for Costs. Court of Appeals, District of Columbia. Filed Dec. 6, 1916. Henry W. Hodges, Clerk.

77 THURSDAY, December 7th, A. D. 1916.

No. 2935.

WASHINGTON RAILWAY & ELECTRIC CO., Appellant,

vs.

ANN CATHERINE SCALA, etc.

The motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States and to stay the mandate until further order, was submitted to the consideration of the Court by Mr. John S. Barbour, attorney for the appellant, in support of motion.

FRIDAY, December 8th, A. D. 1916.

No. 2935.

WASHINGTON RAILWAY & ELECTRIC COMPANY, Appellant,

vs.

ANN CATHERINE SCALA, Administratrix of the Estate of Alvin Joseph Scala, Deceased.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is by the Court this day ordered that said writ issue as prayed, and the bond for costs is fixed at the sum of three hundred dollars, and the bond to act as supersedeas is fixed at the sum of fifteen thousand dollars.

78 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Washington Railway & Electric Company, Appellant, and Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, deceased, Appellee, a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 8th day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—
——— ———.
——— ———.

79 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Washington Railway and Electric Company, as principal, and Wm. F. Ham and Clarence F. Norment, as sureties, are held and firmly bound unto Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, deceased, in the full and just sum of Fifteen thousand ($15,000.00) Dollars to be paid to the said Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, Deceased certain attorney, executors, administrators, or assigns: to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twelfth day of December, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Washington Railway and Electric Company, Appellant, and Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, Deceased, Appellee a judgment was rendered against the said Washington Railway and Electric Company and the said Washington Railway and Electric Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, Deceased, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Washington Railway and Electric Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

WASHINGTON RAILWAY AND ELECTRIC COMPANY. [SEAL.]
By C. P. KING, *President.* [SEAL.]
WM. F. HAM. [SEAL.]
CLARENCE F. NORMENT. [SEAL.]

[Seal of the Washington Railway and Electric Co.]

Attest:
S. R. BOWEN, *Secretary.*

No objection to sureties.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Att'ys for Appellee.

Approved by—

SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 2935. Washington Railway and Electric Co., Appellant, vs. Ann Catherine Scala, &c. Supersedeas bond on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Dec. 18, 1916. Henry W. Hodges, Clerk.

80 UNITED STATES OF AMERICA, *ss:*

To Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Washington Railway & Electric Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 18th day of December, in the year of our Lord one thousand nine hundred and sixteen.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service acknowledged Dec. 18, 1916.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Counsel for Ann Catherine Scala, &c.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 18, 1916. Henry W. Hodges, Clerk.

81 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 80 inclusive constitute a

true copy of the transcript of record and proceedings of said Court of Appeals in the case of Washington Railway & Electric Company, Appellant, vs. Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, deceased, No. 2935, October Term, 1916, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 19th day of December A. D. 1916.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 25,656. District of Columbia Court of Appeals. Term No. 826. Washington Railway & Electric Company, plaintiff in error, vs. Ann Catherine Scala, administratrix of the estate of Alvin Joseph Scala, deceased. Filed December 20th, 1916. File No. 25,656.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1916.

No. 826.

WASHINGTON RAILWAY AND ELECTRIC COMPANY, *Plaintiff-in-Error,*

vs.

ANN CATHERINE SCALA, ADMINISTRATRIX OF THE ESTATE OF ALVIN JOSEPH SCALA, DECEASED, *Defendant-in-Error.*

Error to the Court of Appeals of the District of Columbia. File No. 25,565.

MOTION OF DEFENDANT-IN-ERROR
TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION, AND TO AWARD DAMAGES;
and
BRIEF.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorneys for Defendant-in-Error.

Press of National Publishing Company

IN THE
Supreme Court of the United States
OCTOBER TERM, 1916.

No. 826.

WASHINGTON RAILWAY AND ELECTRIC COMPANY, *Plaintiff-in-Error*,

vs.

ANN CATHERINE SCALA, ADMINISTRATRIX OF THE ESTATE OF ALVIN JOSEPH SCALA, DECEASED, *Defendant-in-Error*.

Error to the Court of Appeals of the District of Columbia. File No. 25,565.

MOTION OF DEFENDANT-IN-ERROR
TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION, AND TO AWARD DAMAGES.

Now comes Ann Catherine Scala, administratrix of the estate of Alvin Joseph Scala, deceased, defendant-in-error in the above-entitled cause, by her attorneys, Daniel W. O'Donoghue and Arthur A. Alexander, and moves this Honorable Court:

TO DISMISS THE WRIT OF ERROR heretofore issued herein, upon the following grounds, to wit:

FIRST: That the judgment of the Court of Appeals of the District of Columbia heretofore rendered in this cause on the 4th day of December, 1916, was and is final in said cause, under Section 250 of "The Judicial

Code," 36 Stats. L., 1159, and writ of error does not lie therefrom to this Honorable Court;

SECOND: That this Honorable Court has no jurisdiction, under Section 250 of "The Judicial Code," 36 Stats. L., 1159, by writ of error to hear or determine this cause, or to review the said judgment of the Court of Appeals of the District of Columbia;

And *TO AWARD DAMAGES TO DEFENDANT-IN-ERROR* herein, under Section 2 of Rule 23 of this Honorable Court.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorneys for Defendant-in-Error, Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, Deceased.

JOHN S. BARBOUR, Esquire,
Attorney for Plaintiff-in-Error,
Washington Railway and Electric Company.

Please take notice that we will submit the aforegoing motion to dismiss and to award damages, together with the hereinafter annexed brief, to the Supreme Court of the United States on Monday, March 26, 1917, at 12:00 noon, or as soon thereafter as counsel can be heard.

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorneys for Defendant-in-Error, Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala, deceased.

Service of a printed copy of the aforegoing motion and notice and hereinafter annexed brief acknowledged this 2d day of March, 1917.

JOHN S. BARBOUR,
Attorney for Plaintiff-in-Error,
Washington Railway and Electric Company.

BRIEF

ON BEHALF OF DEFENDANT-IN-ERROR, IN SUPPORT OF THE AFOREGOING AND ANNEXED MOTION.

STATEMENT.

The declaration in this action was filed by defendant-in-error (plaintiff in the trial Court) on January 27, 1914, in the Supreme Court of the District of Columbia (Rec. 2); and the 1st and 2d counts thereof were discontinued before trial (Rec. 4, 17), and, therefore, need not be further considered.

The 3d and 4th counts of said declaration were framed under Sections 2, 3, 4 and 6 of the Employers' Liability Act of 1908, 35 Stats. L., 65, and the Amendatory Act of 1910 thereto, 36 Stats. L., 291 (Rec. 5-8).

It was not disputed in either of the Courts below that the injury, causing the death of defendant's-in-error intestate, occurred at McCoy's station, about a mile out in the country westwardly from the limits of that part of the City of Washington known as Georgetown, but *within the territorial limits of the District of Columbia.* (Rec. 8, 51.)

In the trial Court on December 11, 1915, judgment on verdict was entered in favor of defendant-in-error for $7,500 (Rec. 11), which judgment was, on appeal, on December 4, 1916, affirmed by the Court of Appeals of the District of Columbia. (Rec. 81.)

On December 6, 1916, ~~defendant~~ plaintiff-in-error filed in said Court of Appeals its motion for a writ of error (Rec. 81). Counsel for defendant-in-error, upon learning of said motion, immediately prepared for filing a "Suggestion Against the Allowance of the Writ of Error," and

on December 9, 1916, upon calling at the clerk's office of said Court of Appeals for the purpose of filing said "Suggestion," discovered that the writ of error herein had been granted by said Court the previous afternoon (Rec. 82), and thereafter on December 12, 1916, filed in said Court on behalf of defendant-in-error a "Suggestion for Revocation of Order Allowing a Writ of Error," etc., which last mentioned "Suggestion" has not been included in the printed Transcript of Record herein, and had not been passed upon by said Court of Appeals at the time the supersedeas bond given by plaintiff-in-error was approved and filed in said Court. Subsequently the Transcript of Record was received and printed in this Court.

WANT OF JURISDICTION

The ground upon which plaintiff-in-error relied in its motion for writ of error in the Court of Appeals (Rec. 81), and upon which it will undoubtedly attempt to rely in this Court in opposition to this motion to dismiss, is the Sixth Clause of Section 250 of the "Judicial Code," 36 Stats. L., 1159, which provides that any final judgment of the Court of Appeals of the District of Columbia may be reviewed by writ of error in this Honorable Court,

> "in cases in which the construction of any law of the United States is drawn in question by the defendant."

The contention of plaintiff-in-error, in substance, is that as the construction of the Employers' Liability Act was drawn in question by it as defendant in the trial Court, this Honorable Court has jurisdiction to re-

view said judgment by writ of error, because said Act is a "general" law of the United States."

The contention of the defendant-in-error is that said Act of 1908 (while, of course, enacted by the Congress of the United States) is, nevertheless, when the injury involved occurs within the territorial limits of the District of Columbia, *under Section 2 of the said Act of 1908*, but *local* law applying to the District of Columbia, and not *general* "law of the United States" within the meaning of said Sixth Clause of the "Judicial Code."

It is respectfully submitted that since the injury and death in this case are shown, without contradiction, by the printed Transcript of Record herein (Rec. 8, 51), to have occurred within the District of Columbia, the said judgment of said Court of Appeals is final under said Section 250 of the "Judicial Code," and cannot be reviewed by writ of error in this Court.

In support of the aforegoing proposition of defendant-in-error, attention is called to the language of this Court in the case of Amer. Sec. & Tr. Co. v. D. C., 224 U. S., 491, saying:

> "The ground upon which the writ was refused by the Court of Appeals was that the words quoted from Sec. 250 should not be construed to apply to the purely local laws of the District, and with that view we agree. * * * But all cases in the District arise under acts of Congress, and probably it would require little ingenuity to raise a question of construction in almost any one of them. If, then, the words have the meaning given them by the applicants, the appellate jurisdiction of this Court has been largely and irrationally increased. We believe Congress meant no such result."

And in support of the proposition that Section 2 of the said Act of 1908 evidences the intention of Congress "to make the provisions of the law applicable to the District *locally*," attention is directed to the decision of this Court, in dismissing a writ of error for want of jurisdiction, in the case of Wash., A. & Mt. V. R. Co. v. Downey, 236 U. S., 190, wherein Mr. Chief Justice White said:

> "The law here involved, as we have said, is the Employers' Liability Act of 1906. * * * The intention to make the provisions of the law applicable to the District locally was manifest and separable from the purpose to enact a statute which would be applicable generally throughout the United States. (Citing cases.) Under this condition there is no ground to maintain the proposition that the statute, as applicable to the District of Columbia, was adopted as one of a general character, and that therefore we have power to review the questions involved.
>
> But it is said, the trolley cars were in transit from the State of Virginia to the District, and therefore were engaged in a movement from state to territory not purely local in its character, and hence there is jurisdiction. * * * The test of whether the statute is general or local depends not upon the particular question to which it may be exceptionally applied in a given case, but upon the exertion of legislative power which the statute manifests and its general operation; that is to say, whether it was enacted as a statute of general application under the general legislative power, or whether it took being as the result of the exercise of the purely local power of

> Congress to govern the District of Columbia, and was, as a general rule, intended to be so applicable."

While the above-quoted decision was speaking of the first Employers' Liability Act of 1906, and the instant case involves the second Employers' Liability Act of 1908, it is apparent, it is respectfully submitted, that the decision is applicable to *Section 2 of the Act of 1908*.

The 3d and 4th counts of the declaration herein (Rec. 5-8) do not allege the plaintiff-in-error was engaged in commerce "*between*" the District and the State of Maryland, which is the preposition in Section 1 of said Act, but allege that it was engaged in commerce "*in* said District and State," using the preposition "in" of Section 2 of said Act. The fact that plaintiff-in-error may have been engaged in commerce between the District and an adjoining State at the time of the injury in question, does not, as was pointed out in the Downey case, *supra*, do away with the fact that the injury occurred "*IN*" the District; and that, therefore, Section 2 of the Act is the applicable section. Said Section 2 in relation to the District of Columbia is but "local" law, and not a general "law of the United States," within the meaning of said Sixth Clause of "the Judicial Code."

It should be borne in mind that the Employers' Liability Act of 1906 in Section 1, that is, *in the same section*, dealt, as was said in the case of El Paso & N. E. R. Co. v. Gutierrez, 215 U. S., 87, with both "trade and commerce IN the District of Columbia and the territories; and, second, with interstate commerce;" and that this Court in that case said:

> "Its (Congress) power to deal with trade or commerce in the District of Columbia and the

territories does not depend upon the authority of the interstate commerce clause of the Constitution. * * *.

We are of opinion that the provisions with reference to interstate commerce, * * * are entirely separable from, and in nowise dependent upon, the provisions of the act regulating commerce within the District of Columbia and the territories. Certainly these provisions could stand in separate acts, and the right to regulate one class of liability in nowise depends upon the other. Congress might have regulated the subject by laws applying alone to the territories."

But when Congress enacted the Act of 1908, it did not, as in the Act of 1906, regulate both classes of liability by provisions in the same section, but *in two different sections*. Section 1 regulating liability in interstate commerce, and Section 2 regulating liability IN the District and territories. The fact that the provisions in the Act of 1908 in respect to the District were thus placed in a separate section, *apart* from the provisions of Section 1, which is a "law of the United States," evidences much more strongly and clearly than did the Act of 1906 with its single section, the intention of Congress to make the Act of 1908 a "local" law when the injury occurs *in* the District.

The language of Mr. Chief Justice White, in the Downey case, *supra*, was directed to the *single* section of the Act of 1906, but it can more forcibly be applied to the separate and distinct Section 2 of the Act of 1908, namely, to repeat:

"The intention to make the provisions of the law applicable to the District locally was mani-

> fest and separable from the purpose to enact a statute which would be applicable generally throughout the United States."

And, again to repeat; the fact, that although the injury occurred in the District, it was also in the course of commerce between the District and the State of Maryland, does not thereby make the liability of the carrier governed by Section 1 of the Act, but by the "local" law of Section 2, because, as was said in the Downey case, *supra:*

> "The test of whether the statute is general or local depends not upon the particular question to which it may be exceptionably applied in a given case, BUT UPON THE EXERTION OF LEGISLATIVE POWER WHICH THE STATUTE MANIFESTS AND ITS GENERAL OPERATION; that is to say, whether it was enacted as a statute of general application under the general legislative power, OR WHETHER IT TOOK BEING AS THE RESULT OF THE PURELY LOCAL POWER OF CONGRESS TO GOVERN THE DISTRICT OF COLUMBIA, AND WAS, AS A GENERAL RULE, INTENDED TO BE SO APPLICABLE."

It is settled that the Employers' Liability Act of 1908, so far as it regulates liability for injuries within the District, "took being as the result of the purely local power of Congress to govern the District of Columbia, and was, *as a general rule,* intended to be so applicable," because, in addition to the said decision in the Downey case, *supra,* this Court had previously said in the Gutierrez case, *supra* (p. 97), in speaking of the Act of 1906, that:

"It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employees engaged in commerce *within* the District.

* * * * * * * *

We think that it is apparent that, had Congress not undertaken to deal with this relation in the States where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia.

* * * * * * * *

We reach the conclusion that, in the aspect of the act now under consideration, the Congress proceeded within its constitutional power, AND WITH THE INTENTION TO REGULATE THE MATTER IN THE DISTRICT AND TERRITORIES, IRRESPECTIVE OF THE INTERSTATE COMMERCE FEATURE OF THE ACT."

If it should be held by this Honorable Court that in this case it has jurisdiction by writ of error to review the said judgment of the Court of Appeals, then the anomalous situation is presented that, although both the Supreme Court and the Court of Appeals of the District of Columbia have been heretofore in some instances held to be "Federal" courts, and, although Section 3 of the Act of Congress approved September 6, 1916, 39 Stats. L., 726, provides that the judgments of the other Federal courts of appeals in Employers' Liability Act cases (even under Section 1 of the last-mentioned Act) cannot be reviewed by writ of error in this Honorable Court, yet the judgments of the Court of Ap-

peals of the District of Columbia in cases involving said Act (even in cases where the injury occurred in the District of Columbia, as in the case at bar), may be reviewed by writ of error in this Honorable Court, unless it should be held that said Court of Appeals of the District of Columbia is a "circuit court of appeals" within the meaning of said Act of September 6, 1916.

It is respectfully submitted that the writ of error herein should be dismissed by this Honorable Court for want of jurisdiction to review by writ of error said judgment of the Court of Appeals of the District of Columbia.

DAMAGES.

It is further respectfully submitted that, under Section 2 of Rule 23 of this Honorable Court, damages should be awarded by this Honorable Court to the defendant-in-error, on the ground that said writ of error has "delayed the proceedings on the judgment of the inferior court," and was "sued out merely for delay," because this Honorable Court has no jurisdiction, as hereinbefore set forth, to review said judgment by writ of error, and because it is apparent from an inspection of the Transcript of Record, and as pointed out in the printed brief filed in this Court on behalf of defendant-in-error (as respondent to a petition for writ of certiorari applied for in this Court in this same cause), that a review is sought in this Court mainly of the weight of the evidence in the trial Court, and no questions of law were presented to said Court of Appeals, or will be, or can be, presented to this Court, which have not already been decided by this Honorable Court in other cases adversely to the contentions of plaintiff-in-error, and because the opinion and judgment of said Court of

Appeals (affirming the rulings and judgment of the trial Court) were in accordance with the decisions of this Honorable Court.

Respectfully submitted,

DANIEL W. O'DONOGHUE,
ARTHUR A. ALEXANDER,
Attorneys for Defendant-in-Error, Ann Catherine Scala, Administratrix of the Estate of Alvin Joseph Scala.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 826.

WASHINGTON RAILWAY AND ELECTRIC COMPANY, PLAINTIFF IN ERROR,

vs.

ANN CATHERINE SCALA, ADMINISTRATRIX OF THE ESTATE OF ALVIN JOSEPH SCALA, DECEASED, DEFENDANT IN ERROR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA. FILE, NO. 25,565.

Reply Brief on Behalf of Plaintiff in Error in Opposition to Motion of Defendant in Error to Dismiss the Writ of Error for Want of Jurisdiction, and to Award Damages.

JNO. S. BARBOUR,
Attorney for Plaintiff in Error.

THE LAW REPORTER PRINTING COMPANY, 518 FIFTH ST. N. W., WASHINGTON, D. C.

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Statement.

This suit was instituted in the Supreme Court of the District of Columbia against the plaintiff in error by the defendant in error, confessedly under the Federal Employers' Liability Law of 1908, as amended in 1910. It resulted in a judgment for $7,500 and was appealed by the plaintiff in error to the Court of Appeals

of the District of Columbia upon various questions of law involving the construction not only of Section 1, but of Sections 3, 4, 5, 6, and 9 of said act as amended. The Court of Appeals affirmed the judgment, and the case was then brought into this court on writ of error under Clause 6 of Section 250 of the Judicial Code. The plaintiff in error, out of an abundance of caution, has already filed a petition for a writ of certiorari which is still pending. The defendant in error now moves to dismiss the writ of error.

ARGUMENT.

The motion of the defendant in error is based upon the ground that this court is without jurisdiction to entertain the writ of error because the first and second counts of the declaration were discontinued, and "the third and fourth counts of said declaration were framed under Sections 2, 3, 4, and 6 of the Employers' Liability Law of 1908 (35 Stat. at L., 65) and the Amendatory Act of 1910 thereto (36 Stat. at L., 291)" (Brief, p. 4).

The record in this case and the brief filed in the Court of Appeals of the District of Columbia by counsel for the defendant in error show that this statement is contrary to the facts and apparently is an after-thought.

The third and fourth counts are laid clearly under Section 1 of the act which provides that "every common carrier by railroad *while engaged in commerce* . . . between the District of Columbia and any of the States or Territories . . . shall be liable in damages to any person suffering injury while *he is employed* by said carrier *in such commerce* or in the case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children

of such employee, and if none, then to such employee's parents."

Section 2 provides that "*every* common carrier by railroad *in* . . . the District of Columbia shall be liable in damages to any person suffering injury while he is *employed* by such carrier *in* . . . *said jurisdiction*, or in case of the death of such employee, to his or her personal representative for the benefit of such employee's parents."

Section 3 provides that "in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, provided that no such employee who may be injured or killed shall be held to be guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of any such."

Section 4 provides that "in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to or death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 5 provides that no contract, rule, regulation or device whatsoever designed to exempt a common carrier from liability created by the act shall be permitted to do so.

Section 6 as amended April 5, 1910, requires that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued, and for concurrent jurisdiction in the

State and Federal courts, and regulates the exercise of the same.

This amendment also added an additional section, No. 9, to the original act, as follows: "That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

Reading these two acts together, and especially the Amendatory Act of April 5, 1910, it is apparent, as is expressed in every section of the original act, as well as in the amendatory act, that both the original act and the amendment were intended by Congress to constitute a single law co-extensive with its jurisdiction throughout the United States and therefore is but one general law, even if we should concede that the particular counts here involved were conceived and intended to state a case arising under Section 2 of the act, because, as was said by this court in Washington, Alex. & Mt. Vernon Ry. *vs.* Downey, 236 U. S., 190, 193:

> "The test of whether the statute is general or local depends not upon the particular questions to which it may be exceptionally applied in a given case, but upon the exertion of the legislative power which the statute manifests and its general operation;"

and because the law and the rights given can not be administered and enforced under Section 2 alone, but Sections 3, 4, 5, 6 and 9, unquestionably general laws, must be invoked and construed. Confessedly Section 1 is general throughout the United States and co-extensive in its operation with the jurisdiction of the Federal Government except as to commerce "*in* the territories,

the District of Columbia, the Panama Canal Zone, or other possessions of the United States," as distinguished from like commerce *between* any of those governmental divisions, or the States. Neither Section 1 nor Section 2 standing alone can be administered, nor the purposes of Congress fully accomplished without the aid of Sections 3, 4, 5, 6, 7, 8 and 9 of the act as amended. These sections are all confessedly general in their nature and operation, and are not the result of the exercise of the plenary power of Congress to govern the District.

As above stated, however, the effort to make it now appear that the cause of action stated in this declaration arose under Section 2 and not under Section 1 is an after-thought as the record will show.

The third and fourth counts allege the defendant, the Washington Railway and Electric Company (Rec., p. 5) to be "a corporation duly incorporated and doing business in the District of Columbia *and* in the State of Maryland . . . and . . . on, to wit, the 8th day of July, 1913, was . . . a common carrier engaged in trade and commerce *in the said District and State* owning and operating certain lines of railways *in said District and State* propelled by electricity . . . being run and operated . . . on and over Prospect Avenue westward from Thirty-sixth Street, northwest, *thence westwardly over a right of way or suburban line or territory and country to Glen Echo and Cabin Johns Bridge, in the County of Montgomery in the State of Maryland*, and . . . the said plaintiff's intestate on the day and date aforesaid . . . *had been and was employed by the defendant as conductor* on one of the summer cars of the defendant operated *over the car line aforesaid* (Rec., p. 5)." On this point the allegations of the fourth count are substantially similar.

A more explicit statement of a cause of action under Section 1 of the Federal Employers' Liability Law, to wit,

a case of injury to an employee of a common carrier engaged in interstate commerce, "while engaged in commerce between the District of Columbia and any of the states" both employer and employee being so engaged, could not be expected or required.

Again, that this declaration was intended to state the case of such an employee injured while so engaged in interstate commerce is shown by the following extracts taken from the brief of the defendant in error filed in the Court of Appeals of the District of Columbia. On page 31, the same counsel who now claim that this declaration was framed not under Section 1, but Section 2, say:

> "Carrying out the previously determined intention of showing the real character of appellant to be a 'railroad' within the meaning of the act, counsel for appellee at the trial below formally introduced in evidence the following U. S. Statutes at Large" (referring to various acts incorporating the defendant company and giving it the right to do business in the District of Columbia *as well as in the State of Maryland*),

and continues:

> "An examination of these statutes shows that 27 Stat. L., 326, July 29, 1892, is 'An Act to incorporate the Washington and Great Falls Electric Railway Company,' and the said company was therein authorized 'to locate, construct, equip, maintain and operate a continuous line of single or double track railway, . . . along the following named streets, avenues, and roads, . . . and running thence west over the Canal Road . . . to Cabin John Creek.' The act in one section, after referring to 'so much of said railway *as may be in the State of Maryland*, gave said Company the right of eminent domain for its right of way, etc., in the District of Columbia.' "

And again, on page 32, they say:

> "Then 31 Stats. L., 270, June 5, 1900, was 'An Act relating to certain railway corporations owning or operatings treet railways in the District of Columbia;' and by Section 1 provided that any one of eight therein-named District of Columbia railway corporations, including the Washington and Great Falls Electric Railway Company and the Metropolitan Railroad Company, 'may, under authority of this Act,' and three therein-named *Maryland railway corporations*, 'may also, if not inconsistent with the laws of Maryland, from time to time, if authorized by their respective boards of directors, enter into contracts with each other, or with any of the others, *for the use of their respective roads, or routes, or any part thereof* . . . Provided, That in case any corporation enter into any such contract it is hereby *authorized to change its corporate name* to any other corporate name'" by certain certificate executed in a prescribed form.

Then, in a self-congratulatory frame of mind, the same counsel who now claim that they drew this declaration under Section 2, proceed:

> "Counsel for appellee also introduced in evidence a certificate filed February 1, 1902 . . . showing that the Washington and Greal Falls Electric Railway Company and the Metropolitan Railroad Company, on January 29, 1902, under the authority of the Act of June 5, 1900, supra, entered into a contract 'for the reciprocal use of their roads or routes;' and that on February 1, 1902, the corporate name of the Washington and Great Falls Electric Railroad Company was changed to the 'Washington Railway and Electric Company,' the present corporate name of appellant.
>
> "These four statutes and recorded certificate show, contra to the assertion in appellant's brief, that appellant under its old corporate name,

> the Washington and Great Falls Electric Railway Company, was chartered not as a 'street railway company,' but as an electric trolley railway line running *entirely westwardly* from 36th and Prospects Streets Northwest, out to Cabin John Creek, Maryland; that is, as an interurban or suburban line, *doing an interstate business*, running from the western edge of the city westwardly through sparsely settled suburbs and the country" (See appellant's brief, p. 33).

And again, on page 34, they say:

> "*That appellant was an interstate common carrier of passengers* is shown by the undisputed testimony of nearly all the witnesses who testified in the case (Rec., pp. 18, 21-25, 28, 35, 47-49); and that it also carried some freight is shown by the testimony of witness Tarbell."

Numerous other instances throughout appellee's brief in the Court of Appeals could be cited, but these are sufficient to show that the position now taken by the learned counsel is an after-thought, inconsistent with their position heretofore, and only grows out of the necessities of their predicament.

Counsel for defendant in error correctly surmised that the jurisdiction of this court to hear and consider this case is based upon the Sixth clause of Section 250 of the Judicial Code (36 Stats. L., 59), which provides that *any* final judgment of the Court of Appeals of the District of Columbia may be so reviewed—

> "in cases in which the construction of *any law of the United* . . . is drawn in question by the defendant."

Seeking to restrict the jurisdiction of this court as to such cases as arise under Section 2 of the act, even though such cases involve the construction of either Sections 3, 4, 6, or 9 of the original and amended acts, which latter

are confessedly general and not local in their origin and operation, counsel argue on their brief (p. 6) that said act of 1908, "when the injury involved occurs *within* the territorial limits of the District of Columbia under Section 2 of the said act, is but local law applying to the District of Columbia and not general law of the United States within the meaning of the said Sixth Clause."

Even if this were true, as has heretofore been pointed out, Section 2 is not the only section necessarily involved in this case to entitle the defendant in error to maintain her recovery. Section 2 merely abolishes the common law "fellow servant" doctrine, as to certain employers and their employees.

Section 3 abolishes the defense of "contributory negligence" as a bar. This section was and is essential to the cause of action whether it rose under Section 1 or Section 2. It is confessedly a general statute applying to all rights of action arising under any portion of the act. It can not be that Section 3 of this act is to be finally construed one way in the District of Columbia and to be finally construed in another way if it is applied to an action in the Maryland courts. But, if the position of counsel for the defendant in error is correct, the judgment of the Court of Appeals of the District of Columbia would be final as to the construction of Section 3 as to the injury in this case, whereas if it had occurred on the Maryland end of decedent's run and the action had still been brought in the Court of Appeals of the District of Columbia, it would not have been final, but a writ of error would lay to this court. The same comment is true as to the construction of Section 4 involving the assumption of risk; Section 6, involving the statute of limitations, and Section 9 governing the survival of the right of action. The construction of each of these sections was and is involved in this case. All of them confessedly are general laws and each of them, if

improperly construed by the Court of Appeals of the District of Columbia, as it is respectfully insisted they all were, and to the prejudice of the plaintiff in error, would necessarily entitle plaintiff in error to a reversal of the judgment in this case.

Counsel for defendant in error cite American Security & Trust Co. *vs.* District of Columbia, 224 U. S., 491, and Wash. Alex. & Mt. Vernon Ry. *vs.* Downey, 236 U. S., 190, to support their contention.

The case first cited can have no possible bearing on the instant case. That was a suit for the condemnation of land "brought by the Commissioners under a Special Act of February 8, 1909, chap. 75, 35 Stat. at L., 597, for the extension of New York Avenue. By that act the procedure was to follow subchapter 1 of chapter 15 of the District Code, which provides, among other things, for the separate assessment of benefits." A statute of a more purely local character could not be imagined, and this court held that that statute was not a "law of the United States" in the requisite sense if any effect was to be given to the purpose of Congress but recently manifested to relieve the court of the duty which had previously been imposed upon it of hearing all appeals from the District Court of Appeals where a sum above $5,000 was involved, and that the final judgments referred to under the Sixth Clause of Section 250 must involve general laws of the United States and not those which were purely local in their inception and operation.

This was clearly brought out in McGowan *vs.* Parrish, 228 U. S., 312, 57 L. Ed., 849, where it was held that when the construction of a law of the United States which is applicable to the United States generally is drawn in question by the defendant, a right of appeal exists, and

a writ of error should be granted. Chief Justice White there said:

> "The line of distinction being, whether the law whose construction was involved was of general application or merely local in character. . . . Undoubtedly revised statute, sec. 3477, is a law of the United States of general application and its construction was drawn in question by the defendant and was construed and passed upon, and hence we think the right of appeal existed."

Counsel on pages 9 and 10 of their brief insert extracts from the case of Wash., Alex. & Mt. Vernon Ry. *vs.* Downey, *supra*. The law there under consideration was the Employers' Liability Act of 1906 which had already been declared unconstitutional as to the States in Howard *v.* Illinois C. R. R., 207 U. S., 463, 52 L. Ed., 297. The court, after stating that fact, said (p. 192):

> "Notwithstanding that ruling, however, the provisions of the statute, so far as they apply to the District of Columbia, have been decided to be within the power of Congress to enact because of its plenary authority as a local legislature of the District, *and* because the intention to make the provisions of the law applicable to the District *locally* was manifest and separable from the purpose to enact a statute which would be applicable generally throughout the United States. Under this condition there is no ground to maintain the proposition that the statute, as applicable to the District of Columbia, was adopted as one of a general character, and that therefore we have power to review the questions involved."

If the court had found itself unable to draw the distinction stated in the first sentence it would have been forced to have held the entire statute unconstitutional.

Under the construction which counsel for defendant in error place upon the garbled extract which they make

from this statement, any law which Congress by reason of its plenary power to enact as the local legislature for the District would be a local law merely by reason of that fact, even though Congress intended the law to be general in its inception and not in the District alone; in other words, wherever the court is able to say that Congress by virtue of its plenary power intended the law to operate in the District as well as elsewhere, so far as it had jurisdiction to so enact, that such statute in respect to the District is local, for it is by reason of its plenary power to legislate in the District that any of its laws are there effective. By virtue of that power it could exempt the District from the operation of any law it wished to, and hence its failure to exempt by express words or necessary implication might be said to manifest a purpose to assert that power. Even so it could not be inferred, that this means that every law general in its nature which is declared invalid in the States because it infringes upon some power reserved or excludes some power granted, is still always valid in the District. That involves the further inquiry which the court referred to in the extract quoted from the Downey case; to wit, whether the intention to make the law operative in the District is separable from the purpose to enact a statute which should be general throughout the United States. Such an inquiry is never necessary as to any statute general in its terms and application so long as it is held valid and constitutional in all its parts. But even if it were necessary in all cases of appeals from the District courts involving statutes of a general nature for the court to make that inquiry, the mere fact of the necessity for the inquiry would involve a construction of the entire statute and would require this court to take jurisdiction in this case for the purpose, if none other, of passing upon that very question, to wit, whether Congress intended the law to be effective locally

independent of its general effect, and also whether Section 2 applied to injuries received by employees who, at the time of their injury, were engaged in interstate commerce in the District of Columbia, and that Section 1 did not apply thereto, even though the injuries complained of were within the terms of the statute as was the evil to be remedied, and all the other sections were of a confessedly general nature and were necessary to be construed in order to give effect to either section. That no such construction was intended in the Downey case is capable of demonstration, for there the court says:

> "Under this condition (the act in its general features having been declared beyond the power of Congress to enact, but the intent to operate locally being sufficiently manifest) there is no ground to maintain the proposition that the statute, as applicable to the District of Columbia, was adopted as one of a general character, and that therefore we have power to review the questions involved.
>
> "But it is said, the trolley cars were in transit from the state of Virginia to the District, and therefore were engaged in a movement from state to territory not purely local in its character, and hence there is jurisdiction. But this rests upon the mistaken assumption that the test of jurisdiction is the character of the act to which the statute applies, and not the nature of the statute itself; that is, whether it is general or local to the District. And this difficulty is not answered by the argument that because the statute was made controlling concerning acts not purely local, therefore, as the effect can not be greater than the cause, the statute must itself be said to be, for the purposes of jurisdiction, not of a local character. But again the proposition rests upon an erroneous assumption. The test of whether the statute is general or local depends not upon the particular question to which it may be exceptionally applied in a given case, *but upon the exertion of legislative*

> *power which the statute manifests and its* GENERAL *operation*, that is to say, whether it was enacted as a statute of general application under the general legislative power, or whether it took being as the result of the exercise of the purely local power of Congress to govern the District of Columbia, and was, as a general rule intended to be so applicable. The error of the argument could not be better illustrated than by saying that if the proposition were admitted, it would necessitate deciding that a statute which has been held to be beyond the constitutional power of Congress to enact so far as it embodied anything but the exertion of local power, may yet be enforced and applied as a general statute."

To have so held after the constitutionality of the act of 1906 as to the District had been approved, and no one ever denied it, would have necessitated a finding that the intent to have the statute operate locally was not sufficiently distinct from its general purpose. The court then continues:

> "The want of foundation for the contention is besides made plainer by looking at the subject from another point of view. While the transit in which the train was engaged was not purely local, the accident complained of occurred within the confines of the District of Columbia, and the statute became applicable concerning it *because, as a local statute*, it governed IN THE ABSENCE OF *legislation by Congress of a general character governing the subject.*"

It is upon this theory alone that state statutes regulating the relations between carriers and their servants have been held applicable to like servants engaged in interstate commerce *in the absence* of other legislation by Congress governing the same subject. The cases cited in the opinion just quoted from establish this.

The aforegoing statement by the court establishes

very clearly to our mind these propositions: That the test of whether this statute is general or local depends not upon the particular question to which it may be exceptionally applied in a given case; that is, it does not depend upon whether the injury arising under it is received in Maryland or in the District of Columbia, but depends upon its general operation; whether Section 1 is applicable to all carriers and their employees engaged in interstate commerce in the larger significance of that expression as either between the States or between the District of Columbia and a State or, on the other hand, whether its general application is to be confined to cases arising or causes of action accruing *outside* of the District to employees engaged in such interstate commerce.

In this connection it must be borne in mind that the language of Section 1 is different from the language of Section 2 of the act as to the persons entitled to its benefits.

Section 1 makes every common carrier by railroad "*while* engaged in commerce between the District of Columbia and any of the States" liable in damages to any person suffering injury *while he is employed* by such carrier *in such commerce*, whereas Section 2 makes every common carrier by railroad "*in* . . . the District . . . liable in damages to any person suffering injury *while he is employed* by such carrier *in any of said jurisdictions*." In other words, under the first section the carrier and his injured employee must both at the time be actually engaged in the commerce protected, while under Section 2 every common carrier mentioned in the District of Columbia whose employee is injured *in the jurisdiction*, even though such employee is not actually engaged in that business at the time, is liable. The latter provision is dependent upon the plenary power of Congress to govern the District of Columbia, and is based upon the exercise of the identical

power for the lack of which as to the states the First Employers' Liability Law was declared unconstitutional as to them but valid as to the District; to wit, that even as to interstate commerce, Congress could not prescribe the condition of the masters' liability to servants other than those engaged in such commerce, while there was no such restriction on commerce *in* the District, and because under the act of 1906 that distinction was not observed the law was held unconstitutional as to the States but was held constitutional as to the District.

In Howard *vs.* Illinois Central R. R. Co., 207 U. S., 463, 498, in which case the Act of 1906 was declared unconstitutional, Mr. Chief Justice White thus clearly stated this distinction:

> "The act then being addressed to all common carriers engaged in interstate commerce and imposing a liability upon them in favor of their employees without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce."

And on page 500, referring to the distinction as to the District of Columbia, he says:

> "The legislative power of Congress over the District of Columbia and the territories being plenary and not dependent upon the interstate commerce clause, it results that the provision as to the District of Columbia and the territories, standing alone, could not be questioned."

Congress evidently kept this distinction in mind, and doubtless for this reason when the second law was drawn made the first section thereof apply to all interstate commerce, including that *between* the District or the territories or each other, and the States, *without regard*

to where the particular injury should be received, and made the second section applicable only to intra-District carriers and their employees.

But it must be remembered that in the Downey case, while the liability sustained rested purely upon the plenary local power of Congress to legislate, it was held applicable to the case of an employee engaged in interstate commerce, merely "because as a local statute it governed *in the absence of legislation by Congress of a general character governing the subject*," a statement which can not be made as to the Act of 1908, because Section 1 applies to and governs as a part of the general law of the nation, all the relations of carriers and their employees engaged in commerce between the States and the District, and is constitutional, and is, of course, controlling to the exclusion of all local law. Seaboard Air Line R. R. *vs.* Horton, 233 U. S., 492, 501, 58 L. Ed., 1062, 1068; Toledo, St. L. & W. R. Co. *vs.* Slavin, 236 U. S., 454, 457, 59 L. Ed., 671, 673; St. Louis & S. F. & T. R. R. *vs.* Searle, 229 U. S., 156, 161, 57 L. Ed., 1129, 1134.

Upon this view alone it is submitted that the motion should be denied.

The suggestion is made that if it should be held by this court that it has jurisdiction by writ of error to review a judgment of the Court of Appeals of the District of Columbia in a case involving the fellow-servants law of 1908, that an anomalous situation will be presented, because Section 3 of the act of Congress approved September 6, 1916 (39 Stat. at L., 726), provides that judgments of Federal Circuit Courts of Appeals in Employers' Liability cases shall not be subject to review under writs of error in this court.

If such an anomalous condition results it is not the fault of this court, and neither is it the province of this

court to correct anomalies resulting from acts of Congress or to extend such acts beyond the fair import of the words used.

Unquestionably under Clause 6 of Section 250 of the Judicial Code the writ of error lies in this case if it involves the construction of a general statute, which it undoubtedly does. An entirely different section of the Judicial Code gave this Court jurisdiction by writs of error over judgments of the Circuit Courts of Appeals. That section has no relation to Section 250 governing writs of error in the Court of Appeals of the District of Columbia. Congress has seen fit to amend the section governing writs of error to Circuit Courts of Appeal and has not seen fit to amend the section governing writs of error to the Court of Appeals of the District of Columbia. This was within its power. If this is anomalous in the view of the learned counsel for defendant in error, it does not alter the fact nor put in the statute words or meanings which Congress did not use or express. Their only remedy will be to apply to Congress to remove this anomaly; but until Congress does so the law is so written and must be so administered.

It is therefore prayed that the motion to dismiss the writ of error as improperly awarded be denied.

Respectfully submitted.

JNO. S. BARBOUR,

Attorney for Plaintiff in Error.